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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 444.

EDWARD S. BROWN, APPELLANT.

vs.

LAWRENCE KENNEDY, AND ELIZA, HIS WIFE, AND COLLY PAYNE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 29, 1872.

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INDEX.

	Original.	Print.
Bill	1	1
Exhibit A, (mortgage)	8	3
Exhibit B, (note)	10	4
Subpœna	11	4
Security for costs	13	5
Appearance	14	6
Order extending time to answer	16	6
Deposition of E. S. Brown	17	7
William C. Ivey	21	8
J. B. Winfree	23	9
Answer	30	11
Deposition of J. L. McDowell	37	13
Replication	57	20
Agreed statement, &c	58	21
Exhibit, (pardon.)	73	25
Exhibit, (application.)	76	26
Decree	80	28
Appeal	81	28
Certificate	83	29
Citation	84	30

1 Pleas before the Hon. Samuel F. Miller and the Hon. John F. Dillon, judges of the circuit court of the United States for the district of Kansas, at a term of said court begun and held at the city of Topeka, in said district, on Monday, the 22nd day of May, A. D. 1871.

EDWARD S. BROWN, COMPLAINANT,
vs.
LAWRENCE KENEDY AND ELIZA, HIS WIFE, and Colly Payne, defendants. } No. 300. In equity.

Be it remembered that, on the 4th day of November, A. D. 1870, the said complainant, by his solicitors, Wilson Shanon and H. T. Green, filed in the clerk's office of said court his bill of complaint in the above-entitled case; which said bill of complaint and endorsements thereon is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas:

To the judges of the circuit court of the United States for the district of Kansas:

2 Edward S. Brown, a resident and citizen of the State of Virginia, plaintiff, brings this his bill against Lawrence Kenedy and Eliza, his wife, and Colly Payne, defendants, each of said defendants being a resident and citizen of the State of Kansas.

And thereupon your orator, the said Edward S. Brown, complains and says, that said Lawrence Kenedy and Eliza, his wife, heretofore, to wit, on the 28th day of May, 1860, in the then Territory now State of Kansas, made and executed their certain deed of conveyance of that date, commonly called a mortgage, and therein conveyed to your orator a certain tract or parcel of land, lying in the county of Leavenworth, in the then Territory, now State, of Kansas, therein described by Government survey as follows, namely: The northeast quarter of section twelve, (12,) in township eight, (8,) of range twenty-one, (21,) containing 160 acres; to have and to hold the same to him, the said Edward S. Brown, his heirs and assigns, forever.

Which deed was subject to a certain condition thereunder written, whereby it was provided, that, whereas the said Lawrence Kenedy was indebted to said Edward S. Brown, in a bond of same date with said deed, in the sum of $1,200.00, payable twelve months after the
3 date thereof, with interest thereon at the rate of twenty per cent. per annum from the maturity of said bond; and that, if the said Lawrence Kenedy should well and truly pay off and discharge said bond with the interest accruing thereon, when the same should become due and payable, then that the said conveyance should become null and void; but otherwise it should remain in full force and virtue.

Which deed of conveyance was afterwards duly acknowledged and certified, and was, on the 28th day of May, 1860, admitted to record in the office of the register of deeds for said county, in the then Territory, now State, of Kansas, and appears of record in said office, in book L., pages 471 & 472. Said deed of conveyance with the certificates of its acknowledgement and of its admission to record thereon endorsed, is herewith filed as a part of this bill, marked "A."

Simultaneously with the execution of said deed of conveyance and

as a part of the same transaction, and bearing even date therewith, the said Lawrence Kenedy then and there signed, sealed, and delivered to said Edward S. Brown his bond, by which he bound himself, twelve months after the date thereof, to pay to said Edward S. Brown said sum of $1,200.00, with interest thereon at the rate of twenty
4 per cent. per annum, from the maturity thereof. The said bond is herewith filed as a part of this bill, marked "B."

And your orator further says that said Lawrence Kenedy did not well and truly pay off and discharge the said bond and the interest accruing thereon, when the same became due and payable, and said deed of conveyance was then, and now remains, in full force and virtue. The said bond now amounts, with the interest accruing thereon, according to its tenor and effect, to the sum of $4,010.83, and is wholly due and unpaid.

Your orator further says, he is informed that the defendant Colly Payne, claims some interest in said lands, derived from said Lawrence Kenedy & Eliza, his wife, under alienations subsequent to the execution and recording of said deed of conveyance, but of the character of such claims he has little or no information and with them, he is advised, he has no concern except to make said Payne a defendant and give him an opportunity of redeeming said lands.

Your orator further says that it is pretended that your orator's claim to relief in your honor's court, is barred by the statute of
5 limitations, but your orator says it is not thus barred; and he further says that he was, at the time of the execution of said deed of conveyance, and has been during his life, a citizen of the State of Virginia, and resided during the late war between the United States and the so-called Confederate States, within that portion of Virginia which was held by the forces of the Confederate States, and whose inhabitants, under act of Congress and the proclamation of the President of the United States, in pursuance thereof, were declared to be in a state of insurrection; that said Lawrence Kenedy was at the time of the execution of said deed of conveyance and at the time of the commencement of said war, and thereafter continued to be, as far as your orator is informed, a citizen of Kansas. Deducting the time of said war, your orator's claim to relief is not barred by any statute of limitations applicable thereto.

And your orator further says that it is pretended by said defendants, that your orator's claim to relief is estopped by certain proceedings, which were had in the district court of the United States for the district of Kansas, during the year 1863, in which said mortgage and said bond were said to have been condemned as forfeited to the United States. But your orator says he is not estopped from asserting
6 his claim to relief in your honor's court by reason of said proceedings; that there was no seizure of said mortgage and said bond by the marshal of the district of Kansas, nor by any one under his authority; that said mortgage and said bond were never in the possession nor under the control of said marshal, neither in the possession nor under the control of any one under his authority; that said mortgage and said bond were, during the whole time, from June, 1860, to September, 1865, without the district and State of Kansas, and within the State of Virginia; wholly in the possession of and under the exclusive control of your orator; that in this case, as in Pelham vs. Rose, recently decided by the Supreme Court of the United States, 9 Wall, 103, there was no such seizure as the law requires, and the district court of the United States for the district of Kansas did not acquire

jurisdiction thereof. Your orator was not guilty of the offences charged in the informations filed in said proceedings; and said mortgage and said bond were not legally liable to confiscation.

In consideration whereof your orator prays that writs of sub-
7 pœna be issued against said defendants, Lawrence Kenedy & Eliza, his wife, & Colly Payne, making them parties in this cause; that each of them do on oath make true and perfect answer to the allegations herein contained; that your honors will fix some short period of time within which said defendants may redeem the lands in said mortgage-deed conveyed; that in default thereof they shall be forever barred and foreclosed from all equity of redemption therein; and that the marshal for the district of Kansas proceed to sell the said lands, and from the proceeds of said sale, pay to your orator the principal and interest due thereon, and the costs by him expended in this suit, and that your honors will grant to him all other just and proper relief And as in duty bound he will ever pray.

EDWARD S. BROWN.

WILSON SHANNON,
H. T. GREEN.
Solicitors for Pl'ff.

(Endorsed:) No. 300. Edward S. Brown vs. Lawrence Kenedy et al. Bill. Filed Nov. 4, 1870. A. S. Thomas, clerk.

8 EXHIBIT "A."

This deed, made the 28th day of May, 1860, between Lawrence Kenedy and Eliza Kenedy, his wife, of the county of Leavenworth, Territory of Kansas, of the first part, and Edward S. Brown, of the county of Cumberland, State of Virginia, of the second part, witnes'eth, that, in consideration of twelve hundred dollars, to Lawrence Kenedy and Eliza Kenedy, his wife, in hand paid, the receipt of which is hereby acknowledged, they, Lawrence Kenedy and Eliza Kenedy, his wife, have granted, bargained, and sold, and by these presents do grant, bargain, sell and convey to Edward S. Brown, a tract or parcel of land lying in the county of Leavenworth, Territory of Kansas, containing 160 acres, being by Government survey, the northeast quarter of section twelve, (12,) in township eight, (8,) of range twenty-one, (21;) to have and to hold the same to him, the said Edward S. Brown, his heirs and assigns, forever.

Upon condition that whereas Lawrence Kenedy is indebted to Edward S. Brown, by bond of the same date with this deed, in the sum of twelve hundred dollars, payable twelve months after date, with
9 interest at the rate of twenty per cent. per annum, from maturity: Now, if the said Lawrence Kenedy shall well and truly pay off and discharge the said bond and the interest accruing thereon, when the same shall become due and payable, then this conveyance shall be null and void; but otherwise it shall remain in full force and virtue.

In testimony whereof we, Lawrence Kenedy and Eliza Kenedy, his wife, have hereunto set our hands and seals this 28th day of May, 1860.

LAWRENCE KENNEDY. [SEAL.]
ELIZA KENNEDY. [SEAL.]

TERRITORY OF KANSAS,
County of Leavenworth, to wit:

I, W. S. Van Doren, register of deeds in the county of Leavenworth, Territory of Kansas, do hereby certify that Lawrence Kenedy and Eliza

Kenedy, his wife, who are personally known to me to be the identical persons, whose names are affixed to the foregoing deed as grantors therein, personally appeared before me in the county and Territory aforesaid, and Lawrence Kenedy acknowledged the instrument to be his own voluntary act and deed; and Eliza Kenedy, his wife, being ex-
10 amined apart from her husband, and having this conveyance fully explained to her, acknowledged that she had executed the same without compulsion or undue influence of her husband, and that the instrument is her own voluntary act & deed.

[SEAL.] W. S. VAN DOREN,
Register of Deeds.

(Endorsed:) 40. No. 300. Lawrence Kennedy & ux. to Edward S. Brown. Mortgage. Territory of Kansas, Leavenworth County. This instrument was filed for record, May (28th,) twenty-eighth, A. D. 1860, at 3½ o'clock p. m., and recorded in book L, of mortgages, at page 471 & 472. W. S. Van Doren, register of deeds. "A." Filed Nov. 4, 1870. A. J. Thomas, clerk. Fee, 1.25, paid.

EXHIBIT "B."

$1,200.]

Twelve months after date, I promise to pay to Edward S. Brown, twelve hundred dollars, (money loaned,) with interest at the rate of twenty per cent. per annum, from maturity.

Given under my hand and seal in the county of Leavenworth,
11 Territory of Kansas, the 28th day of May, 1860.

LAWRENCE KENNEDY. [SEAL.]

(Endorsed:) No. 300. Check "B." Filed Nov. 4, 1870. A. J. Thomas, clerk.

And on this day, to wit, November 4th, 1870, the clerk of said court issued a chancery subpœnai n said entitled cause; which said subpœna, and the endorsements thereon, are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America, to Lawrence Kenedy and Eliza, his wife, and Colly Payne, greeting:

We command you, and every of you, that you appear before our judge of our circuit court of the United States of America, for the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Edward S. Brown, this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default,

12 To the marshal of the district of Kansas, to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of Topeka, in said district, this 4th day of November, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] A. S. THOMAS, *Clerk.*

MEMORANDUM.—The above named defendants are notified that, unless they enter their appearance in the clerk's office at said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

A. S. THOMAS, *Clerk.*

(Endorsed:) No. 300. Circuit court United States, district of Kansas. Edward S. Brown vs. Lawrence Kenedy, et al. Chancery subpœna. Returnable to rule-day, first Monday in December, A. D. 1870. A. S. Thomas, clerk. Shannon & Green, comp't's sol.

Marshal's return.

13 Received this writ Nov. 9, 1870, and served the same on the within-named def't Lawrence Kenedy, on the 19th day of Nov., 1870, by delivering to him personally, a true and correct copy of the within in this dist. The within-named def't Colly Payne, after diligent search, cound not be found in my dist.

D. W. HOUSTON,
U. S. Marshal for the Dist. of Kansas.
By CHA'S H. MILLER, *Deputy.*

Filed Nov. 30, A. D. 1870.

A. S. THOMAS, *Clerk.*

And on this day, to wit, the 7th day of Nov., A. D. 1870, came the said complainant and filed in the said clerk's office security for costs, in the said entitled cause; which said security for costs, and endorsements thereon, is in the words and figures following, to wit:

Circuit court of the United States, district of Kansas.

EDWARD S. BROWN
vs.
LAWRENCE KENEDY ET AL. } No. 300.

I enter myself security for costs in said call, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the
14 plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 4th day of November, 1870.

H. T. GREEN.

(Endorsed:) No. 300. Edward S. Brown vs. Lawrence Kenedy et al. Sec. for costs. Filed Nov. 7, 1870. A. S. Thomas, clerk.

And on this day to wit, Dec. 2, 1870, came the said defendants, by Stillings and Fenlon, their solicitors, and filed in the said clerk's office their appearance in the said entitled cause in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States for the district of Kansas.

EDWARD S. BROWN
vs.
LAWRENCE KENEDY ET AL. } No. 300.

The appearance of the respondents herein is hereby entered to the bill of pl'ff herein filed.

STILLINGS & FENLON,
Counsel & Solicitors for Respondents.

15 (Endorsed:) No. 300. Edward S. Brown vs. Lawrence Kenedy et al. Appearance. Filed Dec. 2, 1870. A. S. Thomas, clerk. Stillings & Fenlon.

And thereupon, and on this day, to wit, Dec. 2, 1870, the clerk of said court entered in the order-book of said court in equity, the appearance of said defendants in the said entitled-cause, which said entry of appearance in said order-book is in the words and figures following, to wit:

FRIDAY, *Dec.* 2, 1870.

EDWARD S. BROWN
vs.
LAWRENCE KENEDY ET AL. } 300.

Now come the defendants in this action, by Stillings & Fenlon, their solicitors, and file and enter their appearance in this case and to the complainant's bill filed herein.

And on this day, to wit, Dec. 2, 1870, at a term of the circuit court of the United States of America in and for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 28th day of November, A. D. 1870—there was present, Hon. John F.
16 Dillon and Hon. Mark W. Delahay, judges.—among other proceedings the following were had, and appear in the records of said court, in the said entitled cause in the words and figures following, to wit:

FRIDAY, *December* 2, 1870.

EDWARD S. BROWN
vs.
LAWRENCE KENEDY ET AL. } 300. In equity.

And now the appearance of the respondents being entered herein, on application of the said respondents, by their counsel, Stillings and Fenlon, for good cause shown, the time to plead, answer, or demur is enlarged until the first Monday of February, 1870.

And on this day, to wit, May 8, 1871, depositions were received by the clerk of said court, and filed in the said clerk's office, in the said entitled cause; which depositions and endorsements thereon, are in the words and figures, following, to wit:

Circuit court of the United States, district of Kansas.

17 EDWARD S. BROWN, PLAINTIFF, vs. LAWRENCE KENEDY & OTHERS, DEF'T. } No. 300. Suit in equity.

The depositions of Edward S. Brown and others, taken before John T. Murrill, a notary public in and for the State of Virginia, at the law office of Edward S. Brown, No. 126 Main street, in the city of Lynchburg, in the State of Virginia, on the 26 day of April, 1871, in pursuance of the notice and commission hereto annexed, to be read as evidence on behalf of the plaintiff in a suit in equity pending in the circuit court of the United States for the district of Kansas, in which Edward S. Brown is plaintiff and Lawrence Kenedy and others are defendants.

The witness, EDWARD S. BROWN, being first duly sworn, deposes and testifies as follows:—(JOHN T. MURRILL, *Notary Public.*)

That he is now in his 54th year of age; was born in the county of Cumberland, in the State of Virginia, and resided either in that county or in Powhatan, an adjoining county in said State, from 40 to 50 miles above the city of Richmond, on the south side of James River, from his infancy until August or Sept., 1866, when he moved to the city of Lynchburg, in the State of Virginia, where he now resides.

18 In May, 1860, he loaned money in Kansas because the rate of interest was higher than it was in Virginia. He then made a loan to the defendant Lawrence Kenedy, and took the mortgage and the bond which the witness filed with his bill in this cause. In June, 1860, the witness returned from Kansas and brought with him to his home in Virginia the mortgage and the bond filed with the bill and mentioned in the proceedings in this cause; and from June, 1860, continuously, until Sept., 1865, he, the witness, kept the said mortgage and the said bond at his home in Virginia, under his exclusive control and in his exclusive possession.

That he did not hear until August, 1865, (for post-offices had not then been re-established in that portion of Virginia where the witness resided, the nearest being at the city of Richmond, 40 miles distant,) that any proceedings had been instituted looking to the confiscation of the said mortgage and the said bond, or either of them; neither did he hear until some weeks thereafter that there had been rendered in the district court of the United States for the district of Kansas what purported to be a decree of condemnation, declaring the said mort-

19 gage and the said bond to be forfeited to the Government of the United States.

The witness says that neither the said mortgage nor the said bond was ever seized, attached, or arrested by the marshal for the district of Kansas or by any deputy marshal for said district, or by any person for or on behalf of said marshal for said district; neither was said mortgage nor said bond ever taken into the possession or held under the control of said marshal for said district, or any deputy marshal for said district, or any person for or on behalf of said marshal for said district; but the said mortgage and the said bond were each, at the time of the institution of said confiscation proceedings; at the time of the return made by James L. McDowell, marshal for said district, on the warrants issued in said confiscation proceedings; at the time of the rendition of said decree of condemnation, and for some years thereafter,

wholly outside and beyond the district of Kansas and wholly within the State of Virginia.

The witness further testifies that he was not guilty of the offences, nor either of them, specified in the act of Congress of the 17th of July, 1862, called the confiscation act, severally set out in the informations filed in said confiscation proceedings. He had not violated the provisions of said act by serving as an officer or private in the army
20 in arms against the Government of the United States. He had not held any office or agency under the government of the Confederate States, or under the government of the State of Virginia. He had not "given aid and comfort to the present rebellion," as charged in said informations.

He staid at home and attended to his private business, and during the whole time, from the commencement, in April, 1861, to the cessation of active hostilities, in April, 1865, he was embraced within, and that portion of Virginia where he resided was embraced within, the military lines held by the confederate forces, and which portion of the State had been by proclamations of the President declared to be in insurrection.

The witness says that, in Sept., 1865, in consequence of having heard, in August of that year, of the confiscation proceedings in Kansas, he went to Washington City and applied to the Government for relief from said confiscation proceedings; that, in conversation with Att'y-Gen. Speed, he was advised by him as the readiest means of getting rid of said proceedings to accept a pardon; and that, on the presenta-
21 tion thereof in said district court, said proceedings would be dismissed. For this purpose, and not because he was guilty of offences, under the act of the 17th July, 1862, or feared any penalty for any offence, he accepted the pardon in the proceedings mentioned. A great many such pardons were then being granted by the Government, and were accepted either to prevent future confiscations or to get rid of proceedings theretofore instituted.

It was then generally understood that it was held by the Government that the insurrection had placed all the inhabitants of the insurrectionary territory in the position of enemies, and all their property had become subject to confiscation, and confiscation suits were then being instituted in Virginia.

And further this witness saith not.

EDWARD S. BROWN.

JOHN T. MURRILL,
Notary Public.

The deposition of William C. Ivey, a witness in behalf of the plaintiff, taken at the same time and place, and to be read in the same cause mentioned in the caption of these depositions.

The witness, being first duly sworn, deposes as follows: That he is twenty-eight years of age; that he resides in the city of Lynchburg, in the State of Virginia; that, during his life, he has known Ed-
22 ward S. Brown, the plaintiff in this cause, and for many years has been very intimate with him; that, in the early part of 1863, he went to school at the house of the plaintiff, in the county of Cumberland, in the State of Virginia, and boarded in the plaintiff's family; that the plaintiff lived in Cumberland County at the commencement of the war, where he had resided many years before, and continued to reside there until about December, 1863, when he moved to the county of Powhatan, about 8 or 9 miles from his former residence.

The plaintiff staid quietly at home during the war and attended to his private matters. The witness further says that he, the witness, is an attorney at law; that he has examined the act of Congress of the 17th of July, 1862, called the confiscation act; that he is informed that, under this act, some proceedings in the United States courts, in Kansas, were instituted in 1863, to confiscate some bonds and mortgages executed by citizens of Kansas to plaintiff, and the witness says that, to the best of his knowledge and belief, the plaintiff did not commit any of the offences enumerated in said act of Congress, by which any of his property was liable to confiscation in said proceedings.

23 The witness further states that, in 1870, he was in the office of the plaintiff, in the city of Lynchburg, and aided him in preparing bills for suit in the circuit court of the United States for the district of Kansas, to foreclose mortgages executed to him by persons in the Territory of Kansas. The plaintiff had then in his possession a large number of mortgages and bonds, which, upon their face appeared to have been executed to him by persons residing in the Territory of Kansas, and the witness then understood, from the plaintiff, that said mortgages and bonds were executed to him, and had been from their dates in his possession or under his control.

And further this deponent saith not.

WM. C. IVEY.

The deposition of John B. Winfree, a witness in behalf of the plaintiff, taken at the same time and place, and to be read in the same cause mentioned in the caption to these depositions.

The witness, being first duly sworn, deposes as follows: That he is forty-one years old; that he resides in the city of Lynchburg, in the State

24 of Virginia; has been intimately acquainted with the plaintiff for the last twenty-five years; that said plaintiff, Edward S. Brown, resided in Cumberland County, in the State of Virginia, from 1845, to about December, 1863; that he then moved to Powhatan County where he was raised, about 8 or 9 miles from his former residence in Cumberland; that this portion of Virginia was held by the confederate forces during the whole time of active hostilities, and by the United States provost guards, who were stationed in each county for about 18 months after the cessation of active hostilities.—(JOHN T. MURRILL, *Notary Public.*)

The plaintiff was not in the army, and held no office of any kind, either under the confederate government or the government of the State of Virginia, and did no act, as far as this respondent knows or believes, for which his property was liable to confiscation. He was a home-staying man during the war, and did not go or have any communication beyond the military lines, as far as this witness knows or ever heard. Some time, in the latter part of 1866, said plaintiff moved to the city of Lynchburg, in the State of Virginia, where he has ever since resided.

25 And further this deponent saith not.

JNO. B. WINFREE.

UNITED STATES OF AMERICA,

Western District of Virginia, City of Lynchburg, to wit:

I, John T. Murrill, a notary public in and for the State of Virginia, duly commissioned and sworn, and duly authorized by the laws of the

United States to take depositions to be used in the courts of the United States, do hereby certify that, in pursuance of the notice and commission hereto attached, I proceeded, on the 26th day of April, 1871, at the law-office of Edward S. Brown, No. 126 Main street, in the city of Lynchburg, in the State of Virginia, to take the foregoing depositions of Edward S. Brown, W. C. Ivey, and John B. Winfree, to be read on behalf of the plaintiff in the suit in equity, No. 300, in which Edward S. Brown is plaintiff, and Lawrence Kenedy and others are defendants, pending in the circuit court of the United States for the district of Kansas. The witnesses were each duly sworn before testifying and
26 then said depositions were severally reduced to writing in my presence; and, after being carefully read to them, they were by the said witnesses severally subscribed in my presence. And I further certify that I am not counsel for either party in this suit nor in any manner interested in the event thereof.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 26th day of April, 1871.

[SEAL.] JOHN T. MURRILL,
Notary Public.

The President of the United States of America to John T. Murrill, a notary public in and for the city of Lynchburg, in the State of Virginia, greeting:

Know ye that we, confiding in your prudence and fidelity, have appointed you commissioner, and by these presents do give you full power and authority diligently to examine, on his corporal oath or
27 affirmation, on oral interrogatories to him propounded, Edward S. Brown, as a witness on his own behalf, in a certain cause now pending and undetermined in the circuit court of the United States for the district of Kansas, wherein Edward S. Brown is plaintiff, and Lawrence Kenedy and others are defendants. And we do further empower you to examine on the same behalf and in like manner any other person or persons who may be produced as witnesses before you; and we do hereby require you to reduce said testimony to writing, and to close up the same, under your hand and seal, directed to A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, at Topeka, in the State of Kansas, as soon as may be convenient after the execution of this commission, and return the same, when executed as above directed, with the title of the cause endorsed on the envelope.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Topeka, this 6th day of April, A. D. 1871, & of our Independence the ninety-fifth.

[SEAL.] A. S. THOMAS, *Clerk.*

28 No. 300. Edward S. Brown vs. Lawrence Kenedy et al. Commission to take depositions.

UNITED STATES OF AMERICA, *District of Kansas:*

Circuit court of the United States district of Kansas.

EDWARD S. BROWN, PLAINTIFF,
versus.
LAWRENCE KENEDY AND ELIZA, HIS WIFE, and Colly Payne, defendants.

The said defendants and their attorneys of record will take notice that, on Wednesday, the 26th day of April, A. D. 1871, the plaintiff

above named will take the depositions of sundry witnesses, to be used as evidence on the trial of the above cause, at the law-office of Edward S. Brown, No. 126 Main street, in the city of Lynchburg, in the county of Campbell, State of Virginia, between the hours of eight o'clock
29 a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned and continued from day to day at the same place and between the same hours until they are completed. Said depositions will be taken orally.

WILSON SHANNON &
H. T. GREEN,
Attorney' for Plaintiff.

Legal service of the above notice is hereby acknowledged to have been made on us this 15th day of April, 1871.

STILLINGS & FENLON,
Attorney for Def'ts.

Edward S. Brown vs. Lawrence Kenedy & als. Depositions of Edward S. Brown, W. C. Ivey, Jno. B. Winfred.

(Endorsed:) No. 300. Opened at the instance of complainant. May 23, 1871. A. S. Thomas, clerk.

30 And on this day, to wit, May 23, 1871, came the said defendants, by Stillings & Fenlon, their solicitors, & file in the clerk's office of said court, their answer to the complainant's bill in the said entitled cause; which answer is in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

The answer of Lawrence Kennedy and Eliza Kennedy, his wife, and Colly Payne, to the bill of complaint of Edward S. Brown, brought against them.

The said Lawrence Kennedy and Eliza, his wife, and Colly Payne, for answer to the bill of said plaintiff, exhibited against them, saving and reserving all manner of exception to the irregularities and insufficiencies of said bill, answer and say that they admit the execution of said bond and mortgage set out in the bill of complaint of said complainant.

And for further answer to said bill of complaint these defendants answer and say that, on the day of A. D. 1863, an information was filed by the district attorney of the United States for the district of Kansas, in the district court of said district, against said Edward S.
31 Brown, and said bond and mortgage, and the credit and money thereby secured, in and by which information it was charged and alleged that said Edward S. Brown had been guilty of each and all of the offences specified in the act of Congres' of July 17, A. D. 1862, commonly called the confiscation act, and that said bond and mortgage, and the moneys and credits thereby secured, were then owned by the said Edward S. Brown, and had become forfeited to the United States of America, by reason of the offences so alleged to have been committed by the said Edward S. Brown, and praying that a writ of monition issue against said bond and mortgage, and the credits thereby secured; and commanding the marshal of said district to seize the same, and to notify all parties in interest to appear in said court, at a day named therein, and show cause why said bond and mortgage, and the credits thereby secured, should not be forfeited to the United States of America; and

that, in pursuance of said writ and the command thereof, the marshal of the United States for the district of Kansas, thereafter, to wit, on the 28th day of March, A. D. 1863, made his return on said writ, whereby he certified to said court that he had seized, arrested, and de-
32 tained said bond and mortgage, and the credits thereby secured, and had caused notice to be given to all parties in interest, as required by said writ and monition, and had delivered a copy of said writ to said Lawrence Kennedy: Whereupon, afterwards, to wit, on the day of May, A. D. 1863, said district court, on motion of said district attorney, and on it appearing to said court that due notice had been given of said proceedings, and after proclamation to all parties interested to come forward and claim their rights in said bond and mortgage, and the credit aforesaid, ordered, adjudged, and decreed, that said bond and mortgage, and the debt thereby secured, be forfeited to the United States of America, on account of the charges and offenses so set forth and alleged in said information against the said Edward S. Brown; and said court then found and adjudged that there was due from said Lawrence Kennedy, on said bond and mortgage, the sum of hundred dollars, which sum was a lien on said lands and tenements; and said court ordered and adjudged that, in case said Lawrence Kennedy
33 failed to pay said above amount to the marshal of the United States for the district of Kansas, within six months thereafter, that said lands and tenements be sold by the marshal of the United States for said district, and the proceeds thereof brought into court to pay the same; and these defendants say that, in pursuance of said order, judgment, and decree, he then paid to the marshal of the United States for the district of Kansas, the entire amount so found due and adjudged against him and against said land.

These defendants, for further answer to said bill of complaint, say that, afterwards, to wit, on the day of , A. D. 1866, said Edward S. Brown moved said district court for leave to file his intervention and claim against the United States, praying that said confiscation proceedings be set aside, and that the bonds, mortgages, and money collected and seized by the marshal of the United States for said district of Kansas therein be adjudged to be paid over by said marshal, and by such other officers of the United States as had the possession thereof, to the said Edward S. Brown; and that, afterwards, to wit, on the 28th day of October, A. D. 1868, said petitioner's claim and
34 intervention was filed in said district court by the said Edward S. Brown; and thereupon, on application of said Edward S. Brown, and on his producing a pardon, issued to him by the President of the United States, relieving him from all penalties and disabilities, on condition that he should not claim any property theretofore confiscated, or any costs in confiscation proceedings against him, it was ordered, adjudged, and decreed by said district court, that, after deducting all costs in said confiscation proceedings made prior to the 26th day of April, A. D. 1866, the moneys and bonds, & property therein seized, should be paid over by the proper officers of the United States to the said Edward S. Brown; which judgment and decree is in full force and unrevoked.

And for further answer to said bill of complaint, and as a defence thereto, these defendants answer and say that the cause of action set out in said bill of complaint accrued to said complainant more than three years next before the first day of November, 1868; and these defendants plead and rely on the statute of limitations of the State of Kansas, in force from the time of the making of said bond and mortgage till the first day of November, 1868.

35 And, for a further defense to said bill of complaint, these defendants say that the supposed cause of complaint set forth in said bill of complaint accrued to said plaintiff more than five years before the filing of the bill of complaint herein; and these defendants plead the statute of limitations of said State of Kansas, now in force as a bar to the relief prayed in said bill.

And these defendants further answer and allege that said money secured by said bond and mortgage was collected and seized on said confiscation proceedings, and that no suit was brought by said plaintiff therefor within one year after the 20th day of February, A. D. 1864; and these defendants plead and rely on the statute of said State of that date as a bar to said suit herein.

And these defendants, for further answer to said bill of complaint, deny the allegations therein, that said bond and mortgage were not seized, attached, and detained by said marshal, and that the statute of limitations is not a bar to said action or suit thereon, and deny that any sum whatever is due to said complainant on said bond and mortgage to said plaintiff; and these defendants deny each allegation
36 in said petition not herein admitted.

STILLINGS & FENLON,
Sols. for Def'ts.

This answer is filed by consent; and the swearing to the same by the defendants is waived.

GREEN & FOSTER,
Solicitor' for Complainant.

(Endorsed:) No. 300. Answer of Lawrence Kenedy and others to the bill of Edward S. Brown. Filed May 23, 1871. A. S. Thomas, clerk. Stillings & Fenlon, sols. for def'ts.

And on this day, to wit, May 23rd, 1871, depositions were received by the clerk of said court, and filed in the said clerk's office, in the said entitled cause; which depositions and endorsements thereon are in the words and figures following, to wit:

Depositions of sundry witnesses, taken by me, Henry M. Herman, a commissioner of the circuit court of the United States for the
37 district of Kansas, on the nineteenth day of May, A. D. 1871, at the office of Stillings and Fenlon, in the city of Leavenworth, county of Leavenworth, and State of Kansas, service of notice to take depositions having been warned, and, both parties appearing, by their respective counsel, and consenting thereto; the deposition to be read on behalf of the plaintiff in the case of E. S. Brown against Lawrence Kennedy.

UNITED STATES OF AMERICA,
District of Kansas, County of Leavenworth, ss:

JAMES L. MCDOWELL, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposes and says:

My name is James L. McDowell. I am forty-four years of age, and reside at Leavenworth, Kansas.

1. Question. Have you been marshal for the district of Kansas? If so, say when your term of office commenced, and when it closed.

Answer. I was United marshal for the district of Kansas. Some time in March, '61, my term of office commenced, and closed in April, '64.

38 2. Question. While you were in office as marshal, did any warrants of seizure or arrest come to your hands under confiscation proceedings, against bonds and mortgages belonging to Edward S. Brown, the plaintiff in this cause?

Answer. There were several papers came into my hands entitled "The United States against A Bond of Six Hundred Dollars and Edward S. Brown," that were issued by virtue of the confiscation law, which were issued from the district court of the United States for the district of Kansas.

3. Question. You will please look at the bond, marked "B," and the mortgage, marked "A," filed by the plaintiff, with his bill, as exhibits in this cause, now shown to you, and say whether said bond or said mortgage were ever seized, arrested, or detained in your custody as such marshal?

(Objected to by defendant's attorney because the question is leading; because it gives to the witness the language he shall use in his answer, and does not ask him what he did or did not do in regard to this bond and mortgage; and because his answer must necessarily be
39 founded on his understanding of the legal effect and meaning of the words used in the question.)

The bond and mortgage referred to being shown to the witness and examined by him, he answered:

Answer. There were a number of writs issued, all headed The United States against a Bond for Six Hundred Dollars and other property, and Edward S. Brown. What I done with those various writs will appear by my written return on those various writs filed in the clerk's office of the United States district court, in Topeka.

The witness is requested to answer the question which was propounded to him.

Question No. 3 being again read to the witness, he answered as follows: "I would refer to my returns on the various writs issued in the case of the United States against a Bond of Six Hundred Dollars and Edward S. Brown and Lawrence Kennedy. There were some thirty cases of this kind in the court during my term as marshal; it would be useless for me to attempt to describe what I done in these cases, from memory; my written return is on file in the clerk's office of the United States district court for the district of Kansas.

The witness is again requested to attend to the reading of
40 question 3rd, and *confirm* his answer to that question.

The question being again read to witness:

(The counsel for the defendant objects on the ground that the answer to the question requires the witness to give a legal construction, and meaning of the word used in the question, and does not require the witness to state the facts as to what he did under the writ; and because the witness has already stated that he could not remember what he did in pursuance of that writ.)

Answer. In that case the various writs issued were again returned by me, with my action endorsed on those writs; that endorsement was what I done in the Kennedy case. I know no better or more direct answer I could give to the question.

(The witness is asked whether he refuses to answer question 3rd, propounded above.

This is objected to by defendant's attorney because the witness has stated that he has given the most direct answer he can give to the question.)

Answer. I do not and I have not. I have come before the commissioner

voluntarily. I am asked as to what I done in my official capacity
41 ten years ago, and two pieces of paper are presented to me and I am asked to indentify them, and describe what I did with them as marshal. I answer, my official returns shows exactly what I did in my official capacity.

4 question. The witness will say whether he ever saw the bond and the mortgage filed with the bill in this cause before they were exhibited to him, when question 3rd was propounded.

Answer. If the papers submitted to me, and referred to in question 3, are the original papers in Kennedy's case, I cannot say I did; in a large proportion, if not all, of these cases, the original papers were not seized, they being in the possession of E. S. Brown, of Virginia. A correct description of the bonds and mortgages *were* taken from the recorder's office of the county in which recorded. An examination was made as to whether the bonds were paid; if not, return was made by me, after the execution of writ that said bond and mortgage was seized, and held, &c., as stated in my returns on the writ in this case and others against Brown. This manner of return was made by advice of Mr. Crozier, then U. S. district attorney, and by direction and sanction of Judge Williams, then U. S. district judge.

Question. When was Judge Williams and Judge Crozier consulted by you as to the form of your return, and what did they say?

42 Answer. Very often. It would be impossible for me to state from memory what they said at any one particular time, on this particular point. It was Mr. Crozier's argument and Judge Williams' decision when the first one of these Brown cases was tried, in answer to Mr. Green and Wheat, who made a fight at that time on this point.

Question. Then Judge Williams described what the return should be before the return was made.

Answer. I did not say so.

Question. What Judge Williams do you refer to, and who was the person you refer to?

Answer. I refer to Judge Williams who was then United States district judge, and who was then holding the U. S. district court at Topeka, Kansas, and was presiding at the trial of these cases.

Question. State what, if anything, Judge Crozier had to do with the dictation of the return, and what consultation you had with him, and how as to the manner and form of the return?

Answer. I consulted with him as the legal officer of the United States. He had nothing to do in the way of dictation.

Question. State whether he saw the form of your return before it was endorsed on the writ, or was consulted as to sufficiency of that form?

43 Answer. It is impossible for me to state from memory whether it was before or after.

Question. State what, if anything, you had in your possession while you held that writ, in the case against Kennedy, where you found it, where you held it, where you kept it pending the cause, and what you did with it?

Answer. My answer to question No. 4, and my return on the writ is the most direct and explicit answer I can give to this question.

Question. Do you *you* recollect where you received the writs in these causes?

Answer. The general usage and custom were to receive all writs at Topeka; they were exceptions. I do not pretend to remember occurrences, generally, of ten years ago.

Question. Have you no recollection in regard to the receipt of this writ and what you did with it while you had it?

Answer. I would not pretend to give my general recollection as to what I done when there is a written record of what I did. I would not pretend to give any other answer than the one I have.

Question. Then I understand you have no recollection of any act done or performed by you while you had in your possession the writ commanding you to seize, detach, and detain in your custody the
44 bond for twelve hundred dollars, executed by Lawrence Kennedy, to Edward S. Brown, and dated the 28th day of May, A. D. 1860.

Answer. You ask me what my official acts were in this case against Lawrence Kennedy. There is an official record of my acts: that record is my answer.

Question. Will you answer the question above asked?

Answer. I did.

Question. Then what recollection have you?

Ans. I endeavor to fairly and fully answer every question asked, but when question after question is asked me as to this or that official act, as U. S. marshal, for me to answer, from memory, as to what I did in this case, ten years ago, when I might remember right or might remember wrong as to what I did, and when counsel insist I must answer from recollection, when they and I well know there is my own official record on file, of my entire official actions. I will answer again that my return on said Kennedy writs, with the explanation of said returns, with my evidence heretofore, at this time is my best recollection of all I did under and with the Kennedy writs.

Question. Then you refuse to make any answer which will contradict that return?

45 Answer. I give you my best recollection, as asked to do. I have answered your question to the best of my ability.

Question. State, Mr. McDowell, if you have not, within the last two months, and often since 1863, and while the confiscation proceedings were pending in the court, stated to H. T. Green, L. B. Wheat, and other persons, both at Topeka, before the court, and at the city of Leavenworth, that you never had in your possession any of the bonds and mortgages executed to Edward S. Brown. If so, state; if not, state what you did state on that said subject?

(Objected to as irrelevant, immaterial, incompetant, and as calling for hearsay evidence.)

Answer. Within the past two months H. T. Greene has several times asked me for information relative to proceedings in these Brown cases, against Kennedy and others, and asked me this question, amongst others; prehaps he may have asked me this question frequently before; prehaps Wheat may have asked it before; perhaps others may. I do not recollect whether or no, nor my answers, nor do I pretend to recollect every identical conversation with Green and Wheat. I admit, in my answer to the 4th question, that if the papers exhibited were
46 the original bond and mort*mort*gage executed by Kennedy, that they had been seized by me, but constructively; and that this was the case in most, if not all, the Brown cases. I very probably have so said to some, perhaps all of parties named in question, and may have done so at different times.

Question. You have stated that, in most of the cases against Edward S. Brown, in your answers above, that most of the bonds and mortgages were in Virginia, in possession of Edward S. Brown. Which of the bonds and mortgages were in the State Kansas, and not in the State of Virginia, within your knowledge?

(Counsel for plaintiff desires that the fact be noted that the witness declines to answer until he has written his reply. Witness here states that he prefers making a rough draft of his answer before making it to the commissioner, on account of counsel for plaintiff having interrupted several times, when I have been required to answer from memory.)

Answer. I have repeatedly stated that, in most, if not in all of the cases of the United States against a Bond of Six Hundred Dollars
47 Edward S. Brown, the bonds and notes were in possession of Mr. Brown, in Virginia. I have also distinctly stated that if the bond and mortgage exhibited to me after question No. 3 were the originals, executed by Kennedy to Brown, they were never in my possession in the Kennedy case; the only seizure made was such as hereinbefore described. No other seizure of any kind, or any original bond or note was taken possession of by me in this case.

Question. You have stated that you been interrupted by counsel, in making your answers from memory, and for that reason you have prefer'ed writing your answers. Now, will you state if you did not, in the beginning of this examination, propose to submit your answers to writing, and submit them to the attorneys for the defendants, or any person, before giving them to the commissioner.

Ans. I did ask leave to consult with an attorney a moment before answering, and was refused. It is not necessary for counsel to endeavor to force answers out of me to suit their convenience by attempting to overawe me as witness. I did. I did ask leave of the commissioner, who I presumed was the presiding officer, to consult with either Mr. Stillings or Judge Horton—I cannot certain which—before being required
48 to answer the question. I wish' to get his opinion as to what effect one portion of my answer might have on myself. I believe I did not make a statement that I desired to write out my answers and submit them to counsel before answering. If I did, such was not my intention at all.

Question. State if you did not decline to give your deposition in this case without the presence of Judge Horton, on yesterday, and telegraphed to him to be present at the taking of this deposition, and declined to have it taken to-day until after his arrival and consultation with him, and if he is not now present, and did not you consult with him in reference to your answers before the commencement of this deposition.

Ans. About a month ago Mr. Green told me he wanted my deposition in this case or in the Brown cases—I will not say positively which. Soon after his conversation with me, I met Judge Horton, and either he or I spoke of these Brown cases—I am not certain which. I told him Mr. Green spoke of having my deposition taken. Judge Horton says they will not take it without notifying me. He said something about an agreement between counsel here and himself, to
49 that effect, and also asked me to see he was notified when my deposition was to be taken. Not later than a week to ten days thereafter, I notified one of the firms—either Mr. Green or Mr. Foster; I do not remember which—of Judge Horton's request and my agreement; also told them I was ready at any time to have my deposition taken. Night before last another member of plaintiff's counsel called at my residence and stated they wished to have my deposition taken in this case. I said I would be ready at any time, and called his attention to this agreement of Judge Horton and myself. He said they would notify Judge Horton night before last. He left without naming the day, hour, or place for taking the deposition. He said Mr. Brown had a letter written to Judge Horton on the subject. Yesterday even-

ing, about seven o'clock, Mr. Green accosted me on the street, and asked me to walk up to Fenlon and Stillings' office, when, for the first time, he spoke of a time and place for taking my deposition. I then again spoke to Mr. Green, Mr. Stillings, and Mr. Fenlon, of my agreement with Judge Horton, and of his request to be present when my deposition was taken. I believe Mr. Green spoke of Mr. Brown
50 having written Judge Horton. Afterwards Mr. Brown came in, and, in answer to a question, stated he still had Judge Horton's letter in his pocket. I did decline giving my testimony without this agreement being carried out, unless required by process. Counsel for plaintiff seen fit to telegraph Mr. Horton. I was in this office at 9 o'clock a. m. to-day, the time and place agreed on to meet, and found no one present except Mr. Stillings. I again came here at 3 o'clock. Soon after coming Mr. Stillings and Judge Horton came in. Some ten or fifteen minutes thereafter plaintiff and counsel came. Judge Horton has been present nearly all the time, occupied in taking this deposition. I did not state that I wished Judge Horton to be present, because I wished to consult with him as to what my answers should be. I have not consulted with him since he came here as to what my answers should be.

State if you did not receive a dispat'h from him this morning, and whether you did not go to the cars to meet him.

Ans. If counsel compel me to give longer answers than necessary it is their fault, not mine. At counsel's request, and to accom'o-
51 date him, the dispatch to Judge Horton was written by me, and signed by me, then read to plaintiff's counsel. I then handed it to plaintiff's counsel, who said he would see it sent at once. About nine o'clock this morning I rode down to the depot, thinking that common courtesy required that some one should notify Judge Horton of the time and place of the taking of the deposition, and I supposed if I did not no other one would. About twelve o'clock a young man who stays in the office of Messrs. Green & Foster brought a despatch to my house, which I opened and read, then gave to him, and requested him to hand it to either Mr. Green or Foster. Mr. Horton stated in that despatch that he did not receive it until the morning or forenoon of to-day, and that he would be here at three o'clock.

Question. Can you now recollect anything more than you have before stated as to what you did with the warrant of seizure against the bond and mortgage in question? If so, state.

Answer. My official returns, and the explanations thereof in my answers heretofore, is all I know about the case.

Question. State if you did not, in the conversation of last night, referred to in your answer second above, in this office of Stillings
52 and Fenlon, and in presence of Stillings & Fenlon, and H. T. Green, say that you would not do or say anything to help Edward S. Brown collect the money in this and other cases of confiscation from either yourself or the persons of whom you had received the money in the confiscation cases. If not, state what you did state on that subject.

Answer. At different times since the action of the court in these confiscation cases, Mr. Green has, on meeting me, incidentally introduced these cases, and talked them over without ever attempting to convey the impression that he was attempting to lay the foundation for a suit, or to use said conversations to contradict my evidence when under oath. I did say last night, in a general talk, in which Mr. Green, Mr. Stillings, Mr. Fenlon, and myself participated, that I did not propose to volunteer facts to form a suit against myself by which counsel's client should

recover a judgment against me for the full amount of money confiscated; neither did I propose to volunteer statements on which they might recover judgments against the defendants in these Brown cases,
53 and the second time compel them to pay the money which they had once paid me on writs issued from the United States district court. I gave at the time my reasons for so saying. I had at one time spent some little time, at the solicitation of plaintiff and counsel in this case, in furnishing them facts and information relative to these cases, and the first use they made of it was to bring suit against myself for the moneys confiscated from Edward S. Brown, and since that time they have brought some two or three other suits in the United States district and circuit courts at an expense to me for counsel fees of five hundred dollars. I well knew that if counsel could so frame his questions and so frame my answers as to furnish grounds for further legal proceedings against myself, that they would be instituted at once.

Question. State if in all these conversations up to last night, if you did not state to H. T. Green that you would at any time give your deposition as to what you had done under the warrant?

Ans. I did frequently state to Mr. Green, in answer to his question, that I was willing to give my deposition in this case or in these
54 cases. I have come at this time voluntarily. I have given as full information as was in my power, to the questions asked. I asked last night if good faith should be kept in carrying out the agreement with Judge Horton before depositions were taken.

Question. You have stated that you went to the records for a description of the bond and mortgage in question. State if in making your return on the warrant of seizure, the description of the bond and mortgage described on that return is in writing or is printed?

(Objected to unless the return is shown to the witness.)

Ans. My returns, as signed by myself or deputies, as now filed in the district court of the United States, will show whether done in writing or printing. Whether written or printed, from memory, I am not able to answer the question.

Question. Do you not remember that in the returns and in the warrant of arrest and monition the description of the bonds and the mortgages were clipped from newspapers and attached to said warrant and to said return?

Ans. There were a great many blanks in those confiscation cases. Some of them—the body principally—printed. There may have been some of the writs in which a portion of the return was printed. From mem-
55 ory, I could not state positively if any of my returns were printed; and particularly I could not state that my returns were printed on the writs referred to in the question.

Question. Did not the processes which came to your hands to be executed by you as marshal give the description of the bonds and the mortgages which you were commanded to seize, attach, arrest, and detain in your custody?

Answer. Those writs referred to in the question were by me returned and are now on file in the clerk's office of the U. S. district court, in Topeka. They were quite lenghty. I do not pretend to be able to give the contents of those writs from memory.

JAMES L. McDOWELL.

I, Henry M. Herman, a commissioner of the circuit court of the United States for the district of Kansas, do hereby certify that James L. McDowell was by me first duly sworn to testify to the truth, the whole

truth, and nothing but the truth; that the deposition by him subscribed as above set forth, was, with the exception of the first four questions only, reduced to writing by myself; that is, all the answers of
56 said witness were reduced to writing in the presence of said witness, and was by him subscribed in my presence; that said deposition was taken by consent of the parties, service of notice having been waived; that I am neither counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand this 20th day of May A. D. 1871.

H. M. HERMAN,
Commissioner for the Circuit Court of the United States for the District of Kansas.

Commissioner's fees, 7.50; witness, 1.50—9.00.

(Endorsed:) Opened at the instance of complainant, May 23, 1871. A. S. Thomas, clerk.

57 And on this day, to wit, May 25th, 1871, came the said complainant, by Shannon & Green, his solicitors, and filed in the clerk's office of said court his replication to the defendants' answer, in the said entitled cause; which said replication and endorsements thereon is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Kansas:

Circuit court of the United States.

EDWARD S. BROWN
vs.
LAWRENCE KENNEDY ET AL. } No. 300. In equity.

The replication of the above-named complainant to the answer of the defendant.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken, to the manifold insufficiencies of the said answer, for replication thereunto, says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by the
58 repliant, without this, that any other matter or thing whatsoever the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed, or denied, is true; all which matters and things repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct; and humbly prays, as in and by his said bill he has already prayed.

SHANNON & GREEN,
Solicitors for Complainant.

(Endorsed:) 300. Edward S. Brown vs. Lawrence Kennedy. Replication of pl'ff. Filed May 25, 1871. A. S. Thomas, clerk.

And on this day, to wit, May 29, 1871, came the said complainant, and the said defendants, by Stillings & Fenlon, their solicitors, and file their statement of record and facts agreed by the parties, and exhibits referred to herein; which are in the words and figures following, to wit:

In the district court of the United States for the dstrict of Kansas, certain proceedings appear on the records and files of said
59 court, in substance as follows:

1st. An information filed by the district attorney for the United States for the district of Kansas, against a bond for the payment of twelve hundred dollars, in twelve months from the date thereof, with interest after due, at the rate of twenty per cent. per annum, executed May the 28th, 1860, by Lawrence Kennedy to Edward S. Brown, and secured by mortgage made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy, to said Edward S. Brown, recorded May the 28th, 1860, in the office of the register of deeds of Leavenworth County, Kansas, in book L, page 471, on the following real estate, in said county of Leavenworth, and State of Kansas, viz:

The northeast quarter of section twelve, (12,) township eight, (8,) range twenty-one, (21,) and alleging that the said bond and mortgage belonged to the said Edward S. Brown, and were forfeited to the United States for certain causes in said information enumerated. The information then charges that said Edward S. Brown, after the 17th day of July, 1862, committed various offences specified in the act of Congress of that date, commonally called the confiscation "act," and prays
60 that process in due form against said bond and mortgage, and the estate, property, claim, credits, and rights thereto and therein, belonging to said Edward S. Brown, to enforce the forfeiture thereof; and that notice be given to all persons in interest to appear, and show cause on the return day of said process, why such forfeiture should not be decreed.

2nd. A warrant was issued the 28th day of March, 1863, by the clerk of said district court to the marshal of said district, as follows:

"Whereas, an information has been filed in said district court on the 28th day of March, 1863, by the United States district attorney for said district, on behalf of the United States against a bond, for the payment of twelve hundred dollars, in twelve months from the date thereof, with interest after due, at the rate of twenty per cent. per annum, executed May the 28th, 1860, by Lawrence Kennedy, to said Edward S. Brown, and secured by mortgage made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy to said Edward S. Brown, recorded May the 28th, 1860, in the office of register of deeds of Leavenworth County, Kansas, in book L, page 471, on the following real estate, in said county of Leavenworth, and State of Kansas, viz:
61 The northeast quarter of section 12, in township 8, of range 21, for reasons and causes in the said information mentioned, and praying the usual process and monition of the said court in that behalf to be made; and that all persons interested in said bond and mortgage, and the estate, property, claim, credits, and rights thereto and therein, belonging to the said Edward S. Brown, may be cited in general and special to answer the premises; and also, due proceedings being had, that said bond and mortgage, and the estate, property, claim, credits, and rights thereto and therein, belonging to the said Edward S. Brown, may, for the causes in the said information mentioned, be condemned, and the proceeds thereof be distributed according to law:

"You are therefore hereby commanded to attach the said bond and

mortgage, and the estate, property, claim, credits, and rights thereto and therein belonging to the said Edward S. Brown, and to retain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be con-
62 demned as forfeited and the proceeds thereof distributed according to the prayer of the said information, that they be and appear before the said court to be held in and for the district of Kansas, on the 20th day of April, 1863, at ten o'clock of the forenoon of that day, if the same be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make the allegations in that behalf; and what you shall have done in the premises do you then and there make return thereof."

3rd. The return of the marshal, endorsed on the aforesaid warrant, as follows:

"Received the within warrant March 28th, 1863. In obedience to the same I have attached, arrested, and detained the following described bond, mortgage, and credit, to wit: A bond for the payment of twelve hundred dollars, in twelve months from the date thereof, with interest after due, at the rate of twenty per cent. per annum, executed May the 28th, 1860, by Lawrence Kennedy to said Edward S. Brown, and secured by mortgage made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy, to said Edward S. Brown, re-
corded May the 28th, 1860, in the office of the register of deeds
63 of Leavenworth County, Kansas, in book L, page 471, on the following real estate in the said county of Leavenworth, and State of Kansas, viz: The northeast quarter of section 12, township 8, of range 21, within mentioned, and have cited and notified Lawrence Kennedy and Eliza Kennedy, and all other persons having or pretending to have any right, title, or interest therein, as by the said warrant I am commanded to do. I also caused notice to be published for fourteen days from and after April 1st, 1863, in the 'Leavenworth Weekly Bulletin,' a newspaper published nighest the property herein described and seized, and also caused a copy of the same to be posted on the court-house door in Topeka, April 1st, 1863.

"Dated Leavenworth, the 14th day of April, 1863."

4th. Decree of the United States district court for the district of Kansas, May the 5th, 1863, as follows:

"UNITED STATES OF AMERICA
vs.
"A BOND FOR THE PAYMENT OF TWELVE hundred dollars, in twelve months from the date thereof, with interest after date at the rate of twenty per cent. per annum, ex-
64 ecuted May the 28th, 1860, by Lawrence Kennedy to Edward S. Brown, and secured by mortgage made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy, to said Edward S. Brown, recorded May the 28th, 1860, in the office of the register of deeds of Leavenworth County, Kansas, in book 'L,' page 471, on the following real estate in the county of Leavenworth and State of Kansas, viz: the northeast quarter of section 12, township 8, of range 21." } No. 140. Information.

"The marshal having returned that he had duly attached the bond and mortgage, credits, and property above described and given due notice to all persons claiming the same, that this court would, on the 20th day of April, A. D. 1863, proceed to the trial and condemnation thereof, should no claim be interposed for the same, on motion of Robert Crozier, esq., United States district attorney, proclamation is made for all persons having anything to say why the same should not be condemned and declared forfeited to answer the prayer of the information herein; and, no person appearing as to the said bond and mortgage, on like motion, it is ordered by the court, that as to the said
65 bond and mortgage the default of all persons be entered; that the said bond, mortgage, and credit be, and the same are hereby, condemned and declared forfeited to the United States of America to answer the prayer of the libelants herein.

"And Lawrence Kennedy, obligor and mortgagor in the bond and mortgage given to secure the same described herein, having entered his appearance and filed his answer and obligations in this cause, the court doth find that there is due from the said Lawrence Kennedy the sum of twelve hundred dollars, ($1,200.00,) secured by mortgage executed by the said Lawrence Kennedy and Eliza Kennedy, on the following real estate, situate in the county of Leavenworth and State of Kansas, to wit, northeast quarter of section twelve, (12,) township 8, of range twenty-one. It is therefore ordered, adjudged, and decreed by the court that the said Lawrence Kennedy, within six months from the date of this decree, pay into court, for the use of the United States of America, the sum of twelve hundred dollars ($1,200.00) with legal interest from this date; and that, in default thereof, the said real estate, (N. E. 12, T. 8, R. 21,) under an order of sale to be issued from the office of the clerk of this court, be appraised, advertised, and sold by the marshal
66 of the United States for the district of Kansas, according to the laws of the State of Kansas regulating sales under execution; and that for any remainder due after applying the proceeds of said sale execution issue as upon judgment at law. And it is further ordered and decreed that the said Lawrence Kennedy be forever barred and foreclosed of and from all equity of redemption, and all right, title, & interest of, in, and to the said mortgaged premises from and after the said sale; and that the purchaser at said sale be let into the possession of the said premises on production of the marshal's deed for the same."

These proceedings were embraced in two confiscation suits, No. 140 and 141, (afterwards consolidated,) in which similar proceedings were had as to many other bonds and mortgages executed by persons in Kansas to said Edward S. Brown; and under said proceedings various and uncertain sums of money came into the hands of various office's of said district court.

And, on or about the 18th day of October, A. D. 1865, said Edward S. Brown came to Kansas, and, by his counsel, filed his motion in said district court for leave to file a petition, therein alledging that he
67 was not guilty of the offences charged in the information filed in said confiscation proceedings; that the bonds and mortgages therein described had never been seized or attached or taken into the possession or custody of the marshal for the district of Kansas, but had been, during the whole time, in the possession of Edward S. Brown at his home in the State of Virginia; and praying that the judgments, orders, and decrees in said proceedings be vacated and annulled; that an account be taken of the moneys which had come into the hands of the officers of the court, and that the same, after deducting legal costs,

be delivered to him, and for such other and further relief as he might be entitled to. Said motion was held under advisement until the succeeding term of court, and was then overruled; from which ruling of said court Edward S. Brown carried said cause on error to the circuit court of the United States for the district of Kansas, and, in said last-named court, the ruling of the said district court was reversed, and said district court ordered to permit said petition to be filed; and said petition was filed on the 12th day of October, 1868; and said Edward S. Brown exhibited a pardon issued to him by the President of the United States, and said that he had accepted the same. An official copy of said pardon is herewith filed, marked "X," and also an official copy of the application on which said pardon was granted is also herewith filed, marked "Y."

68

And thereupon the said district court ordered, adjudged, and decreed that all the property and money which theretofore had been collected or received by any officer or officers of the said court under, in pursuance, or by virtue of any judgments, orders, or decrees in said proceedings theretofore made or endorsed, be by such officers immediately brought into court; that all unpaid legal costs in said cases or either of them incurred on or before the 26th day of April, 1866, be taken therefrom and paid to the parties entitled thereto; and that all the property and money aforesaid except so much thereof as was necessary for the payment of the legal costs incurred in those cases on or before the 26th day of April, 1866, be paid to said Edward S. Brown; and by the order of said court the said cases were reserved for such other and further proceedings, orders, and judgments therein as might become necessary and proper.

69

And in said confiscation proceedings a petition by said Edward S. Brown was subsequently filed, and is now pending, praying that said confiscation cases be referred to a commissioner, to ascertain the moneys collected and received by said officers, and the liabilities of said officers and all others into whose hands such moneys may have gone therefor; that a report thereof be made to the court, and that judgment be given in favor of the petitioner for the several sums of money to which he may be entitled, and for all other just and proper relief; and that rules be made against said officers and all others who, in the progress of said proceedings, may appear to have received said moneys, to show cause why said petition should not be granted.

Statement of facts.

Edward S. Brown, the plaintiff in this cause, is now and has been during his life, a citizen of the State of Virginia, and has, during his life, resided in that part of Virginia which, during the late civil war was, by the proclamation of the President, declared to be in insurrection. He was, from the commencement to the termination of active hostilities, within the military lines held by the confederate forces, and within that part of Virginia declared to be in insurrection, as aforesaid.

70

The bond executed by Lawrence Kennedy, and the mortgage by said Kennedy and wife, filed by the plaintiff as exhibits with his bill, were executed in the Territory of Kansas, at the time of their dates, and the mortgage duly recorded, as stated in the bill.

The defendants were then residents of said Territory, and have been citizens of the State of Kansas ever since Kansas became a State; and during all of said time, said Kennedy and wife resided, and ever since

have resided, on the land mentioned in said mortgage, in Leavenworth County in Kansas.

Lawrence Kennedy paid to the officers of said court the amount of money which he was ordered to pay, under the decree in the confiscation proceedings mentioned in this cause.

Of said confiscation proceedings, the plaintiff, Edward S. Brown, had no knowledge prior to August, 1865. He was not guilty of any of the offences mentioned in the act of July 1862, charged in said information.

71 From June, 1860, to September, 1865, continuously, Edward S. Brown had in his possession, at his home, in the State of Virginia, the said bond and the said mortgage, and during this whole space of time neither said bond nor said mortgage was in the district of Kansas.

The officers of the district court for the district of Kansas, and each of them, have wholly failed to comply with the order of said court, mentioned in the statement of said confiscation proceedings of the 12th of October, 1868. Edward S. Brown has never received anything from any one on account of said order.

He has never received any payment on account of said bond and said mortgage.

He disclaims desiring in any proceedings anything more than one satisfaction of the debt secured by said mortgage, and he avers his readiness as soon as this is obtained to release said mortgage and surrender any remedies he may have to said Kennedy.

It is agreed that the foregoing statement of the substance of the records and files in the district court of the United States for the district of Kansas in the confiscation proceedings mentioned, so far as said

72 proceedings effect the questions in this cause, shall be considered by the court as a record duly authenticated by the clerk of said court.

It is also agreed that the foregoing statement of facts, so far as said facts may be competent, shall be considered as admitted by the parties, and in connection with any other facts proved by the exhibits, and depositions filed, shall have such weight as they may be entitled to in deciding the questions in this cause.

EDWARD S. BROWN.
STILLINGS AND FENLON,
Sol's for Def't's.

(Endorsed:) No. 300. Edward S. Brown vs. Lawrence Kennedy et als. Statement of record and facts agreed by the parties. Filed May 29, 1871. A. S. Thomas, clerk.

73 Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Whereas Edward S. Brown, of Powhatan County, Virginia, by taking part in the late rebellion against the Government of the United States, has made himself liable to heavy pains and penalties:

And whereas the circumstances of his case render him a proper object of executive clemency:

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers good and sufficient reasons me thereunto moving, do hereby grant to the said Edward S. Brown a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows:

1st. This pardon to be of no effect until the said Edward S. Brown shall take the oath prescribed in the proclamation of the President, dated May 29, 1865.

2nd. To be void and of no effect if the said Edward S. Brown shall hereafter, at any time, acquire any property whatever in slaves, or make use of slave labor.

74 3rd. That the said Edward S. Brown first pay all costs which may have accrued in any proceedings instituted or pending against his person or property, before the date of the acceptance of this warrant.

4th. That the said Edward S. Brown shall not, by virtue of this warrant, claim any property, or the proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

5th. That the said Edward S. Brown shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington, this sixteenth day of September, A. D. 1865, and of the Independance of the United States the ninetieth.

[L. S.]

ANDREW JOHNSON.

By the President:

WILLIAM H. SEWARD,
Secretary of State.

75 UNITED STATES OF AMERICA,
Department of State:

To all to whom these presents shall come, greeting:

I certify that the document hereunto annexed is a true copy from the record in this Department.

In testimony whereof I, William H. Seward, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this seventeenth day of Feb'uary, A. D. 1866, and of the Independance of the United States of America the 90th.

[SEAL.]

WILLIAM H. SEWARD.

(Endorsed:) Pardon "X," referred to in agreed statement. Edward S. Brown, No. 300, vs. Lawrence Kennedy. Filed May 29, 1871. A. S. Thomas, clerk.

76 (Copy.)

To his Excellency Andrew Johnson, President of the United States:

Your petitioner, Edward S. Brown, respectfully represents that he is 47 years of age. He resided in Cumberland County, in the State of Virginia, at the time of the passage of what was called the ordinance of secession. He now resides in Powhatan, an adjoining county. He did not belong to any military organization except the ordinary State militia, during the war, having never volunteered in any military service; and in 1864, when the conscription of the confederate authorities was extended so as to embrace persons of his age, he was exempted

from service by a board of surgeons on account of physical disability. He has never held any office or agency from the confederate government, nor did he, during the war, hold any office or agency from any government of the State of Virginia. He cultivated a small farm, which did not yield sufficient crops for family consumption. From these he furnished only such portions as were required by the government as taxes.

After the conflict arose between the Federal and State authori-
77 ties, the feelings and sympathies of your petitioner were borne along by an unbroken tide of public sentiment in favor of his native State.

He now cheerfully abides the result of the war. As soon as an opportunity was presented in his part of the State, he took in good faith the amnesty oath prescribed by President Lincoln, and then the oath prescribed in the proclamation of your excellency.

The taxable property of your petitioner, under the laws of Virginia, never amounted to the sum of $20,000, and he did not apprehend any difficulty on account of confiscation.

In 1859 and 1860 he loaned money to several persons in Kansas for the sake of the better legal interest there than in his own State. The principal of these loans exceeds $20,000, but your petitioner is advised that under the laws of the United States the annual interest only is taxed, which, together with his other taxable property, is less than $20,000.

On these funds your petitioner relies for the payment of his indebtedness, much of which is due on account of funds coming to his hands as guardian for infant children. He made no effort, after the breaking out of hostilities to transfer any of these funds to the South. From the commencement to the cessation of hostilities he had no communication with any one in Kansas. He has been very recently informed
78 that some proceedings, the exact state of which he has had no opportunity of learning, have been instituted by the courts of the United States in Kansas, looking to the confiscation of the claims of your petitioner against the citizens of that State. Your petitioner relies on the clemency of your excellency, and he now respectfully asks for such interposition as will arrest further judicial proceedings, and that you will grant to him all other relief which his case may require.

(Signed) EDWARD S. BROWN.

CITY OF RICHMOND,
State of Virginia, to wit :

Edward S. Brown, whose name is signed to the foregoing writing, personally appeared before me, a notary public, in the city aforesaid, and made oath that the facts therein stated are true, to the best of his knowledge and belief. Given under my hand this 15th day of Sept., 1865.

(S'g'd) P. W. GRUBBS, *N. P.*

[5 c't stamp.]

I have for some time known E. S. Brown, esq., the petitioner, and from such knowledge & experience, unhesitatingly recommend him as one very worthy of your excellency's amnesty & pardon, as may restore him to his rights and future usefulness.

Mo. resp'y & very truly.

(Signed) CHARLES PALMER.

To his Excellency AND'W JOHNSON,
Pres't of the U. States.

79 (Copy.)

I recommend the pardon of the petitioner.
(S'g'd) F. H. PIERPOINT.

UNITED STATES OF AMERICA :

DEPARTMENT OF JUSTICE, *May 2nd*, 1871.

Pursuant to the act of Congress of February, 22nd, 1864, I hereby certify that the annexed paper is a true copy of the original application on file in this office.

In witness whereof I have hereunto set my hand and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

[SEAL.] A. T. AKERMAN,
Attorney General.

(Endorsed:) Application "Y" referred to in agreed statement. Edward S. Brown, vs. No. 300. Lawrence Kennedy. Filed May 29, 1871. A. S. Thomas, clerk.

80 And on this day, to wit, May 29th, 1871, at a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the 22nd day of May, A. D. 1871—

There were present the Hon's Samuel F. Miller and John F. Dillon, judges—

Among other proceedings the following decree was made by said court, and entered of record in said cause. Which decree was in the words and figures following, to wit:

MONDAY, *May* 29, 1871.

EDWARD S. BROWN
vs. } 300.
LAWRENCE KENNEDY, ET AL.

This cause came on to be heard on the bill, answer, exhibits, and testimony taken, and the agreed statement of facts, and of the record in the confiscation proceedings mentioned, filed by the parties: on consideration whereof the court finds that the law and equity of this case is with the defendants. Whereupon the court doth order, adjudge, and decree that the complainant's bill be, and the same is hereby, dismissed at his costs.

81 And on this day, to wit, June 1st, 1871, at the said May term, A. D. 1871, of said court, among other proceedings, the following were had in said entitled cause and appear of record in the words and figures following, to wit:

TUESDAY, *June 1st*, 1871.

EDWARD S. BROWN
vs. } 300.
LAWRENCE KENNEDY.

This day come the parties into court, and, on motion of Edward S. Brown, an appeal is allowed to him in the above-entitled cause; and he

thereupon filed his appeal-bond, which was approved by the court; and also a citation to the defendants, service of which was acknowledged by their counsel.

And on this day, to wit, June 1st, 1871, came the said complainant and filed in the said clerk's office his appeal-bond in said entitled cause; which said appeal-bond is in the words and figures following, to wit:

Supreme Court of the United States.

EDWARD S. BROWN, APPELLANT,
vs.
LAWRENCE KENNEDY AND ELIZA, HIS WIFE, and Colly Payne, appellees.

82 Know all men by these presents that we, Edward S. Brown, H. T. Green, & John Fletcher, are held and firmly bound to Lawrence Kennedy and Eliza, his wife, and Colly Payne, in the sum of two hundred dollars, to be paid to Lawrence Kennedy and Eliza, his wife, and Colly Payne, their executors and administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 1st day of June, 1871.

Whereas the above-named Edward S. Brown hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such, that if the above-named Edward S. Brown shall prosecute his appeal to effect, or shall answer all costs and damages if he shall fail to make good his plea, then this obligation to be void, or else to remain in full force and virtue.

EDWARD S. BROWN. [SEAL.]
H. T. GREEN. [SEAL.]
JOHN FLETCHER. [SEAL.]

Approved:
SAM'L F. MILLER.

(Endorsed:) No. 300. Edward S. Brown vs. Lawrence Kennedy. Appeal-bond. Filed June 1, 1871.

A. S. THOMAS, *Clerk.*

83 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the record of all the proceedings had in said court, in the case of Edward S. Brown, complainant, vs. Lawrence Kennedy and Eliza, his wife, and Colly Payne, defendants. No. 300, in equity, in the said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 4th day of October, A. D. 1872.

[SEAL.] A. S. THOMAS, *Clerk.*

84 UNITED STATES OF AMERICA, *ss*:

To Lawrence Kennedy and Eliza, his wife, and Colly Payne, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein Edward S. Brown is appellant and you are appellees, to shew cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 1st day of June, 1871.

SAM. F. MILLER, *Judge.*

JUNE 1ST, 1871.

Service of the above citation made on this day.

STILLINGS & FENLON,
Att's for Defendants.

(Indorsed:) No. 300. Edward S. Brown vs. Lawrence Kennedy. Citation for appeal. Filed June 1, 1871. A. S. Thomas, clerk.

(Indorsement on cover:) No. 444. Edward S. Brown, appellant, vs. Lawrence Kennedy and Eliza, his wife, & Colly Payne. Kansas C. C. U. S. Filed 29th October, 1872.

O

Supreme Court of United States.

No. 444.—DECEMBER TERM 1872.

EDWARD S. BROWN, *Appellant*, *vs.* LAWRENCE KENNEDY AND WIFE, etc., *Appellees.*	Appeal from Decree of Circuit Court of U. S. for the District of Kansas.

Supreme Court of United States.

No. 444.—DECEMBER TERM 1872.

EDWARD S. BROWN, *Appellant*, *vs.* LAWRENCE KENNEDY AND WIFE, etc., *Appellees.*	Appeal from Decree of Circuit Court of U. S. for the District of Kansas.

Abstract of the Case.

Lawrence Kennedy, of the county of Leavenworth, Kansas, contracted with Edward S. Brown, of the county of Cumberland, Virginia, for the loan of $1,000, with interest to be paid thereon at 20 per cent. per annum—then lawful interest in Kansas. He executed his bond for the same, including one year's interest, as follows:

"Twelve months after date, I promise to pay to Edward S. Brown, twelve hundred Dollars (money loaned) with interest at the rate of twenty per cent. per annum, from maturity. Given under my hand and seal in the county of Leavenworth, Territory of Kansas, the 28th day of May, 1860."

To secure the payment thereof, Lawrence Kennedy and Eliza Kennedy, his wife, on the same day executed their mortgage,

conveying to said Brown the following real estate in the county of Leavenworth, Kansas, viz: the north-east quarter of section 12, township 8, range 21; which mortgage was, on the same day, acknowledged and recorded in the office of the Register of Deeds of Leavenworth, Kansas, in book L, page 471—pp. 3, 4.

Said Brown was then in Kansas; but in June, 1860, he returned to his home in Virginia, and took with him said bond and mortgage; and there retained them in his exclusive possession, until the latter part of 1865, pp. 7, transcript; 18 and 25, transcript 71. His home, where he remained during the war, was in that portion of Virginia, which, by the proclamation of the President, was declared to be in insurrection; and between the citizens residing therein and those residing in the loyal States, intercourse was prohibited, pp. 8, transcript 20; and 24, transcript 69, 70. This prohibition was by Brown strictly observed;—pp. 7, transcript 18, 19; and 25, Transcript 70.

Information.

In March, 1863, the District Attorney filed his information, in the District Court of the United States for the District of Kansas, "against a bond for the payment of twelve hundred dollars, in twelve months from the date thereof, with interest after due, at the rate of twenty per cent. per annum, executed May 28, 1860, by Lawrence Kennedy to Edward S. Brown, and secured by mortgage made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy to said Edward S. Brown, recorded May 28, 1860, in the office of the Register of Deeds, of Leavenworth county, Kansas, in Book L, page 471, on the following real estate, in said county of Leavenworth, and State of Kansas, viz: The north-east quarter of section twelve (12), township eight (8), range twenty-one (21), (p. 21); and alleged "that the said bond and mortgage belonged to the said Edward S. Brown, and were forfeited to the United States for certain causes in said information enumerated."—p. 21. It charged, "that said Edward S. Brown, after the 17th day of July, 1862, *committed various offenses* specified in the act of Congress of that date, commonly called the Confiscation Act,"—p. 21; and

prayed, "that process in due form against *said bond and mortgage*, and the estate, property, claim, credits and rights *thereto and therein* belonging to said Edward S. Brown, to enforce the forfeiture thereof; and that notice be given to all persons in interest to appear and show cause on the return day of said process, why such forfeiture should not be decreed."—p. 21.

Warrant and Monition.

On the 28th day of March, 1863, a warrant was issued which recited that the District Attorney had filed an information "on behalf of the United States, against a bond for the payment of twelve hundred dollars, in twelve months from the date thereof, with interest after due, at the rate of twenty per cent. per annum, executed May the 28th, 1860, by Lawrence Kennedy to said Edward S Brown; and secured by mortgage made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy to said Edward S. Brown, recorded May the 28th, 1860, in the office of the Register of Deeds, of Leavenworth county, Kansas, in Book L, p. 471, on the following real estate in said county of Leavenworth, and State of Kansas, viz: The northeast quarter of section twelve (12), in township eight (8), of range twenty-one (21), for reasons and causes in the said information mentioned; and praying the usual process and monition of the said Court in that behalf to be made; and that all persons interested in said bond and mortgage, and the estate, property, claim, credits and rights thereto and therein belonging to the said Edward S. Brown, may be cited in general and special to answer the premises; and also due proceedings being had, that said bond and mortgage, and the estate, property, claim, credits and rights thereto and therein belonging to the said Edward S. Brown, may, for the causes in the said information mentioned, be condemned, and the proceeds thereof be distributed according to law. You are therefore hereby commanded to attach the said bond and mortgage, and the estate, property, claim, credits and rights *thereto and therein* belonging to the said Edward S. Brown, and to retain the same in your custody."—pp. 21, 22.

Marshal's Return.

On the 14th of April, 1863, the Marshal made his return on the warrant as follows: "Received the within warrant March 28th, 1863. In obedience to the same I have attached, arrested and detained the following described bond, mortgage and credit, to wit: a bond for the payment of twelve hundred dollars in twelve months from the date thereof, with interest after due, at the rate of twenty per cent. per annum, executed May 28th, 1860, by Lawrence Kennedy to said Edward S. Brown, and secured by mortgage made and acknowledged May 28th, 1860, by by said Lawrence Kennedy and Eliza Kennedy, to said Edward S. Brown, recorded May the 28th, 1860, in the office of the Register of Deeds of Leavenworth county, Kansas, in book L, p. 471, on the following real estate in the said county of Leavenworth, and State of Kansas, viz: the north-east quarter of section 12, township 8, of range 21, within mentioned, and have cited and notified Lawrence Kennedy and Eliza Kennedy, and all other persons having or pretending to have any right, title or interest therein as by the said warrant I am commanded to do I also caused notice to be published for fourteen days from and after April 1st, 1863, in the Leavenworth Weekly Bulletin, a newspaper published nighest the property herein described and seized, and also caused a copy of the same to be posted on the Courthouse door in Topeka, April 1st, 1863."—p. 22.

Decree.

On the 5th of May, 1863, the Court rendered its decree as follows: "United States of America *vs.* a bond for the payment of twelve hundred dollars in twelve months from the date thereof, with interest after date at the rate of twenty per cent. per annum, executed May the 28th, 1860, by said Lawrence Kennedy to Edward S. Brown, and secured by mortgage, made and acknowledged May the 28th, 1860, by said Lawrence Kennedy and Eliza Kennedy to said Edward S. Brown, recorded May the 28th, 1860, in the office of the Register of Deeds of Leavenworth county, Kansas, in book L, p. 471, on the following real estate

in the county of Leavenworth and State of Kansas, viz: the north-east quarter of section 12, township 8 of range 21.

"The Marshal having returned, that he had duly attached the bond and mortgage, credits and property above described, and given due notice to all persons claiming the same, that this Court would on the 20th of April, A. D., 1863, proceed to the trial and condemnation thereof, should no claim be interposed for the same, on motion of Robert Crozier, Esq., United States District Attorney, proclamation is made for all persons having anything to say, why the same should not be condemned and declared forfeited, to answer the prayer of the information herein; and no person appearing as to the said bond and mortgage, the default of all persons be entered; that the said bond, mortgage and credit be, and the same are, hereby condemned and declared forfeited to the United States of America, to answer the prayer of the Libellants herein."—pp. 22, 23.

The Court then ordered Kennedy to pay into Court within six months from the date thereof, $1,200.00, with legal interest (seven per cent.) from said date, and in default thereof, that his land be sold—p. 23. Kennedy failed to pay within six months. An order of sale issued, and Kennedy paid the Marshal the amount reqnired by the decree to be paid—p. 25.

There was no evidence tending to show that Brown was guilty of the offenses charged—no such finding by Court or jury. In the Court below, it was proved he was not guilty—(pp. 8, 9, 10), and this fact is admitted—p. 25.

The Marshal's return was false. He had not attached, arrested and detained the bond, mortgage and credit described in his return; but they were in the possession of Brown, at his home in the county of Cumberland, State of Virginia, and were not in Kansas for years after said return and decree. They were never seized, attached, nor in any manner taken by said Marshal, nor held in his custody—pp. 7, 8, 9. This fact is agreed—(p. 25, Transcript 71), and proved by the Marshal himself—p. 15, Transcript 41; and p. 17, Transcript 46, 47

Of said confiscation proceedings, said Brown had no knowledge prior to August, 1865—(pp. 7, Transcript 18), and this fact is agreed—p. 25. He then simply learned that some proceedings had been instituted looking to the confiscation of his bonds and mortgages. He applied to the President for such interposition as would arrest further judicial proceedings in said confiscation —pp. 26, 27. He was advised by Attorney General Speed, as the readiest means of getting rid of the confiscation proceedings, to accept a pardon; and he adopted this course—p. 8.

Brown then proceeded to Kansas and presented to the District Court his petition, and moved for leave to file the same, alleging that he was not guilty of the offenses charged in the information; that the marshal's return was false; that the bonds and mortgages described had not been seized, attached nor taken into the possession of the marshal; but had been during the whole time in the possession of said Brown, at his home in Virginia, and prayed that said proceedings be annulled and vacated; that an account be taken of the moneys that had come to the hands of the officers of the Court, and that the same, after deducting legal costs, be delivered to him.—pp. 23, 24. The District Court refused to allow the petition to be filed. On writ of error, the Circuit Court reversed the ruling of the District Court. On the 12th of October, 1868, said petition was filed, and the Court ordered its officers to bring into Court the money which had been by them collected in the confiscation cases against bonds and mortgages belonging to said Brown, (there were many of them, including that of Kennedy,) from which the legal fees of the officers were to be deducted, and the balance paid to Brown —pp. 23, 24.

Nothing has been received by Brown under this order.—p. 25. The money had been squandered by the Court and its officers. Brown has never received any payment on account of said bond and said mortgage—p. 25; and he disclaimed on the record desiring more than one satisfaction of the bond and mortgage, and averred his readiness, as soon as that was obtained, to surrender any remedies he might have to Kennedy.

The suit below was instituted the 4th of November, 1870, in the Circuit Court of the United States, for the District of Kansas, by Brown against Kennedy and wife, to foreclose said mortgage and enforce the payment of the bond thereby secured.—pp. 1, 2, 3, 4.

The bill anticipated the defenses of the Defendants: First: the State Statute of limitations; and alleged that the time from the commencement to the termination of the war should be deducted from the computation: Second: that the confiscation proceedings estopped Brown from suing Kennedy and wife on the bond and mortgage; and alleged that he was not thereby estopped; that the marshal's return was false; that the bond and mortgage had not been seized, and were never in the possession nor under the control of the marshal; that the District Court did not acquire jurisdiction thereof; and further, that the bond and mortgage were not liable to confiscation, and that Brown was not guilty of the offenses charged in the information pp. 2, 3.

Brown filed with his bill said bond and mortgage.

The Defendants answered (pp. 11, 12, 13) and relied on these defenses:

1st. That the confiscation proceedings estopped Brown from maintaining suit on the bond and mortgage.

2d. That Brown had accepted a pardon, and that the order of the District Court of the 12th October, 1868, directing the officers to bring in the money from which their fees were to be deducted, and the balance to be paid to Brown, had not been revoked.

3d. Limitations: That the statute in force when the bond was executed fixed a limitation of three years; that this statute was substituted the 1st day of November, 1868, by a statute which fixed a limitation of five years; that the cause of action had accrued more than three years before the 1st of November, 1868, and more than five years before the suit was brought. They denied that the time of the war should be excluded from the computation. They also relied on a statute enacted the 20th of February, 1864, which by its terms required that suits to recover

choses in action, secured by mortgage or unsecured, that had been seized and confiscated by process of law, should be brought within one year from the date of said statute—General Statutes of Kansas, 1868, p. 550.

To this answer the Plaintiff replied generally—p. 20.

This cause was heard on the 29th of May, 1871: Hon. Saml. F. Miller, Associate Justice of the Supreme Court, and Hon. John F. Dillon, Circuit Judge, sitting. The Court summarily decreed, that the Plaintiff's bill be dismissed at his costs —p. 28.

Assignment of Errors.

The Court erred in dismissing the Plaintiff's bill. The opinion which led to the error is not indicated in the decree; but it is known to the counsel, to be, in holding that the confiscation proceedings in the District Court estopped the Plaintiff from maintaining a suit on the bond and mortgage, notwithstanding the false return of the Marshal.

On this, especially, and on each of the errors assigned, the Appellant asks the decision of the Court.

The Court erred on each of the issues, as follows:

1st. In holding, that the confiscation proceedings estopped the Plaintiff from maintaining suit on the bond and mortgage.

2d. In holding, that the Plaintiff's acceptance of a pardon, and that there was no revocation of the order of the District Court, of the 12th of October, 1868, to the officers to bring in the money which they had collected or received, from which their fees were to be deducted, and the balance to be paid to the Plaintiff, estopped him from maintaining suit on the bond and mortgage.

3d. In holding, that the Plaintiff's right to maintain his suit was barred by the Statute of Limitations; that the time of the war was not to be excluded in computing the period at which the statute becomes a bar.

4th. In failing to decree the payment of the bond, and in default thereof, the foreclosure of the mortgage; and in dismissing the Plaintiff's bill with costs.

Points and Authorities.

1. The Plaintiff in the Court below was not estopped from maintaining his suit on the bond and mortgage by reason of the confiscation proceedings in the District Court.

The *res* sought to be confiscated in these proceedings was the *bond* and *mortgage*, as it was the *note* in *Pelham* vs. *Rose*, 9 Wall., 103; and in *Pelham* vs. *Way*, No. 51, decided at the present term of the Supreme Court. This is to be tested by examining the information, warrant, marshal's return and decree. In this examination we will compare the proceedings against the bond and mortgage in this case with the proceedings against the note in *Pelham* vs *Rose* and *Pelham* vs. *Way*. In these cases the information was "against the following described credits and effects of one Henry Pelham, who was a person guilty of aiding and abetting an armed rebellion against the said United States, that is to say: one promissory note for the sum of seven thousand dollars, dated March 1st, 1862, and due four years after date, executed by Lewis Pelham to the said Henry Pelham and against all persons intervening for their interests therein, and more especially against the said Henry Pelham." See record in *Pelham* vs. *Rose*, p. 3, and *Pelham* vs. *Way*, p. 2.

Again: "The said Henry Pelham, being the owner of said estate, credits and effects so described as aforesaid, continued to to aid and abet the armed rebellion as aforesaid." Record in *Pelham* vs. *Rose*, p. 4, and *Pelham* vs. *Way*, p. 3.

Again: "Said estate, credits and effects of him the said Henry Pelham, so described as aforesaid, became and was forfeited to the United States, and that the same was liable to be condemned as an enemy's property; wherefore the said Attorney of the United States * * * prayed that process in due form of law might be issued against the said estate, credits and effects so described as aforesaid, to enforce the forfeiture and condemnation thereof; and requiring all parties in interest and more especially the said Henry Pelham to appear and show cause on the return day of said process, why said forfeiture should not be decreed in manner and to the extent by law provided; and that process

might also issue against the maker of said note, to wit: the said Lewis Pelham, and that due service and return thereof should be made." Record in *Pelham* vs. *Rose*, p. 4, and *Pelham* vs. *Way*, p. 3.

The information in the case now before the Court, was filed against a bond (describing it minutely) secured by a mortgage (describing it minutely), and alleging that said bond and mortgage belonged to the said Edward S. Brown, and were forfeited to the United States, and prays "process in due form against said bond and mortgage, and the estate, property, claim, credits and rights *thereto and therein* belonging to said Edward S. Brown, to enforce the forfeiture thereof, and that notice be given to all persons in interest, to appear and show cause on the return day of said process, why such forfeiture should not be decreed."—p. 21, and ante p. 2.

The Court held in *Pelham* vs. *Rose*, and *Pelham* vs. *Way*, that the information against the following described *credits and effects* of one Henry Pelham, that is to say, one promissory *note*; and charging that said estate, credits and effects of him, the said Henry Pelham, so described as aforesaid, were forfeited, is a proceeding against the note.

The words *estate*, *credit* and *effects*, are descriptive terms, applied to the note, denoting ownership. It was the right of property in said note which was sought to be confiscated. The note was the *res* to be seized; and its seizure is no less necessary because Lewis Pelham, the maker, and Henry Pelham, and all others having any interest therein, were to be cited to show cause against its forfeiture.

So, in this cause, the information was against *the bond* secured by the mortgage, and process was prayed against *said bond and mortgage*. The addition of the words "and the estate, property, claim, credits and rights *thereto and therein* belonging to said Edward S. Brown, simply denote the ownership in the bond and mortgage. *The bond* and *the mortgage* constitute the *res*, against which process is prayed, for the purpose of forfeiting Edward S. Brown's estate, property, claim, credits and rights *thereto and therein*. The forfeiture of the estate,

property, claim, credits and rights of the owner in the *res*, and the forfeiture of the *res*, are equivalent phrases. They mean the same thing; and in each, it is equally necessary, that the *res* shall be seized.

It is manifest from this comparison, that the information in Brown's case was directed against the bond and the mortgage, like it was in Pelham's case against the note, that the bond and the mortgage was the *res* in one case, as the note was in the other.

The monition and warrant of seizure in *Pelham* vs. *Rose* (Record, pp. 4, 5), and *Pelham* vs. *Way*, (Record, pp. 3, 4), recited the information against one promissory note (describing it), and against all persons intervening for their interest therein, praying the usual process and monition that all persons interested in said note may be cited to answer the premises, and that said note may be condemned and the proceeds thereof distributed according to law. It then commands the Marshal to attach the note, and to detain the same in his custody, and give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned.

The monition and warrant of seizure in Brown's case (pp. 21, 22 and ante p. 3), recited the information against a bond (describing it) secured by a mortgage (describing it), and prayed the usual process and monition, and, that all persons interested in said bond and mortgage, and the estate, property, claim, credits and rights *thereto and therein* belonging to said Edward S. Brown, may be cited to answer the premises; and that said bond and mortgage, and the estate, property, claim, credits and rights *thereto and therein* belonging to the said Edward S. Brown may be condemned, and the proceeds distributed according to law. It then commands the Marshal to attach said *bond and mortgage*, and the estate, property, claim, credits and rights *thereto and therein* belonging to the said Edward S. Brown, and retain the same in his custody, and give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned as forfeited.

The Marshal could not doubt from the language of this writ, as to the duty he was required to perform. He is to attach said

bond and mortgage (the bond and mortgage therein described), and Edward S. Brown's estate, property, claim, credits and rights in said bond and mortgage; and retain the same—that is, said bond and mortgage, in his custody.

In this warrant, the bond and the mortgage was the *res* to be attached and retained, as in Pelham's case, the note was the *res* to be attached and detained. That the Marshal so understood it, we shall see, when we come to his return thereon.

The return in *Pelham* vs. *Rose* (Record, p. 5), and *Pelham* vs. *Way*, (Record, p. 4), is as follows: "In obedience to the within warrant, I have arrested the property within mentioned, and have cited all persons having or pretending to have any right, title or interest therein, as by said warrant I am commanded to do."

The return in Brown's case (p. 22, ante 4) is, "Received the within warrant, March 28th, 1863. In obedience to the same I have attached, arrested and detained the following described bond, mortgage and credit, to wit: a bond (describing it), secured by a mortgage (describing it) within mentioned, and have cited and notified Lawrence Kennedy and Eliza Kennedy, and all others, having or pretending to have, any right, title or interest therein, as by said warrant I am commanded to do."

He describes the bond and the mortgage, and nothing else; and when he says, "the following described bond, mortgage and credit, to wit," he means the bond and mortgage and nothing else. The word credit is used as a synonym with bond and mortgage.

Marshall McDowell defines the *res*, which he pretended to seize, to wit: the bond and mortgage, described with more precision than did Marshal Rose, who said, "the property within mentioned."

It is evident from the decree (pp. 22, 23) that the District Court so understood the marshal. Having given exactly the same description of the bond and mortgage, and nothing else, the Court proceeded, "the marshal having returned that he had duly attached the bond and mortgage, credits and property *above described*, and given due notice to all persons claiming the same,

that this Court would, on the 20th day of April, A. D. 1863, proceed to the trial and condemnation thereof * * * proclamation is made for all persons having anything to say why the same should not be condemned, * * * and no person appearing as to said bond and mortgage, on like motion, it is ordered by the Court, that, as to the said bond and mortgage, the default of all persons be entered; that the said bond, mortgage and credit be, and the same are hereby condemned and declared forfeited."

The Court commences by describing the *res* as the bond and mortgage, and nothing else; and every allusion to it thereafter is attended with qualifying words which refer to that description. The default is as to the bond and mortgage alone, and the condemnation embraces no more. On the marshal's return, the Court regarded itself as having acquired jurisdiction of the bond and mortgage: nothing more.

Why the words "credit, property and estate" are inserted, sometimes one, and sometimes others, in the proceedings, are easily explained. The words of the Act of Congress of 17th July, 1862, 12 Stat. at Large, 590, Sec. 6, are, "all the estate and property, moneys, stocks and credits of such person shall be liable to seizure, as aforesaid." In all prosecutions, the practice is encouraged of adopting the words of the statute. The words, bonds and mortgages are not found in the Act, but in them the owner has estate and property, and they may be called his credits. So, in the proceedings against Brown, after describing the bond and mortgage, the officers speak of the estate and property of Edward S. Brown *thereto and therein*; and again, after saying the bond and mortgage, they insert credit or credits, as synonymous therewith.

The Court held in *Pelham* vs. *Rose*, and *Pelham* vs. *Way*, that the note, being capable of manual caption, must be taken into the actual custody of the marshal to constitute a valid seizure, and without this, the Court cannot adjudicate the condemnation thereof. In the cause now before the Court, the bill expressly alleges that there was no seizure of the bond and mortgage by the Marshal for the District of Kansas; but that during all the

time of said pretended confiscation proceedings, said bond and mortgage were without the District of Kansas, and within the exclusive possession and control of Brown, at his home in Virginia, and that the Court acquired no jurisdiction thereof.—pp. 2, 3. On this allegation issue is joined and testimony taken. The allegation is proved by the testimony taken on behalf of the Plaintiff.—pp. 7, 8, 9. It is proved by the deposition of the Marshal himself, though a very unwilling witness.—pp. 15, 17. That the bond and mortgage was from June, 1860, to September, 1865, in the possession of Brown, at his home in Virginia, and was not, during all this time, in the District of Kansas, is a fact agreed by the parties.—p. 25. Then, on the authority of *Pelham* vs. *Rose*, 9 Wall., 103, and *Pelham* vs. *Way*, No. 51, decided at the present term of the Court, we say the Court below should have held that there was no valid seizure of the bond and mortgage, that the District Court acquired no jurisdiction over them, and the Plaintiff was not estopped from maintaining his suit to foreclose the mortgage and enforce the payment of the bond.

We might rest the argument on this proposition, in confidence, that as we have shown, the Marshal's return in Brown's case points to the bond and mortgage with more distinctness than in Pelham's case it pointed to the note, the opinion of the Court in that case will control the decision in this.

We learn, however, that the opposing counsel ascribes weight to the use of the word *credit* in the proceedings.

We have shown that this word in the Marshal's return can mean nothing, but the bond and the mortgage, and on this return, specially hinges the jurisdiction of the Court. No matter what had been done before, if the official act of the Marshal did not bring the *res* within the territorial jurisdiction of the Court, no jurisdiction was acquired over the subject.

For the sake of argument, we go a step further. If the Marshal had adopted the language of the information, and the warrant, and after the words, "the bond and the mortgage" he had added "and the estate, property, claim, credits and rights *thereto*

and therein belonging to the said Edward S. Brown," that return would have comprehended no other *res* than Brown's bond and mortgage. To claim that the owner's right to the *res* may be seized in one territorial jurisdiction, while the *res* is in another, is far beyond any position maintained in any of the Courts. What! Can it be maintained, that the owner's right to his horse may be seized in Kansas, while the horse is in his quiet possession in Virginia? or, that the captain's right to his ship may be seized in Kansas, while the captain is in command, and the ship securely sailing in mid-ocean? The forfeiture of the horse, or ship, or bond and mortgage, is nothing but the forfeiture of the owner's "estate, property, claim, credits and rights *thereto and therein.*"

The opposing counsel rely on *Miller* vs. *The United States*—11 Wall., 268; but that decision does not interfere with the position taken above, nor the views expressed theron. It is distinguished therefrom in *Pelham* vs. *Way*. In *Miller* vs. *The United States*, by a divided Court, four to three, the Chief Justice and one Associate Justice not sitting, it was held that Miller's stock had been confiscated without manual caption of the certificates, by which the stock was represented; and by Mr. Justice Strong, who delivered this opinion, the proceedings were likened to foreign attachment and garnishment.

Whether there can be proceedings by foreign attachment and garnishment, under the act of the 17th of July, 1862, may well be doubted. The seventh section says: "to secure the condemnation and sale of any of such property after the same shall have been seized, so that it may be made available for the purpose aforesaid, *proceedings in rem* shall be instituted in the name of the United States." The requirement that proceedings shall be *in rem* excludes proceedings *in personam*. The subsequent clause—"which proceedings shall conform as nearly as may be to admiralty or revenue cases," does not dispense with the necessity, that the proceedings must be "*in rem*;" but simply means, that, if the *property seized* be within the admiralty jurisdiction, the proceedings shall conform to admi-

ralty practice—a libel and decree; and, if the property seized be on land, the proceedings shall conform to common law practice in revenue cases—an information, verdict of jury and judgment. Neither foreign attachment nor garnishment are proceedings *in rem*. They are proceedings *in personam* and *inter partes*. In foreign attachment, the creditor is Plaintiff. The principal Defendant is his non-resident debtor, who is joined with a home co-defendant, who has estate or effects belonging to the non-resident debtor. These three parties are necessary to maintain the suit; and on the Defendants there must be personal service, to give jurisdiction; in the State Courts, service on the non-resident being by publication, in virtue of State Statute.

If the non-resident defendant comes and enters appearance, and gives bail, the suit abates as to the home defendant, and the any attachment or garnishment is discharged. If he does not appear, the Plaintiff must prove: First: the debt against him—by profert of the bond, if it be debt on bond; and, Second: that the home defendant has estate or effects belonging to the non-resident debtor. On this proof personal judgment is rendered. If the estate or effects be sufficient, the whole debt is discharged; if not, it is satisfied *pro. tanto*. If the plaintiff be a judgment creditor, and the object of the garnishment be to enforce his judgment lien on the estate or effects belonging to his debtor in the hands of the garnishee; still, there must be personal service on the garnishee, and personal judgment is rendered. In these proceedings, the rights of the parties are adjudicated on questions between the plaintiff and his debtor, and between his debtor and the garnishee; and between themselves respectively, the parties are concluded by the adjudication. The attachment of estate or effects in the hands of the garnishee, is an ancillary proceeding in the suit *inter partes*. It does not change it from a suit *in personam* to a suit *in rem*. In a suit *in rem*, the *res* is the defendant. Process is served on it by its seizure; and rights between persons are not adjudicated. Courts of admiralty entertain suits *in personam* as well as suits *in rem*.

In *Manro* vs. *Almeida*, 10 Wheat., 474, the Court held that admiralty has jurisdiction *in personam* for a tortious seizure on

the sea, to compel appearance by attachment. That case was not regarded by the Court as a proceeding *in rem*.

In *Tunstall* vs. *Worthington*, Hempst., 662, Mr. Justice Daniel, of the Supreme Court, said, that garnishment is a suit; and the parties must have their day in Court; and because the Plaintiff and garnishee were both citizens of Arkansas, he held the Court had no jurisdiction.

In *Clarke* vs. *New Jersey Steam Navigation Company* (1 Story, 531), Judge Story (p 537) commented on *Manro* vs. *Almeida*, and held, that a corporation as well as a private person "is suable in the admiralty by process of attachment in a suit *in personam*." He did not understand a proceeding in foreign attachment or garnishment. as a proceeding *in rem*. In *ex parte*, *Foster* (2 Story, 131. see pp. 153, 154). Judge Story, after reviewing the authorities, holds, that attachment is a lien, merely conditional, and depends on the event of the suit between the parties.

In *Mankin* vs. *Chandler*—2 Brock., 125, Chief Justice Marshall, to whom the ablest Judges may bow without condescension, said (p. 130) "I am perfectly satisfied, that a foreign attachment is not to be considered a proceeding *in rem*; but as a suit by a plaintiff against defendants, and that a decree in such cases is within the general rule of being conclusive evidence only against parties and privies." *

If, under the Act of the 17th of July, 1862, Congress required, that confiscation proceedings "shall be *in rem*," and foreign attachment and garnishment are proceedings *in personam*, then property cannot be confiscated by foreign attachment and garnishment. The subjects of confiscation as expressed in the act are "estate, property, moneys, stocks and credits;" and jurisdiction over these subjects is given only to the District Court of the District "within which the *property* above described, or any part thereof, may be found." Only the property described by the words "estate, property, moneys, stocks and

* NOTE. The Counsel for the Appellant is informed, that the 7th volume of Robinson's Practice, which will shortly be issued from the press, discusses this subject; and he doubts not, the learned author will demonstrate the correctness of Judge Marshall's opinion.

credits" can be confiscated. Each of these words, "*estate, property, moneys, stocks and credits*," is used, sometimes, if not always, in legal proceedings, or in common parlance, to signify material things; such as may be seized; such as may be called property; and may be found within the territorial jurisdiction of a District Court. We speak of purchasing railroad stock. This may mean shares in the corporation evidenced by certificates, as the Court regarded it in *Miller* vs. *The United States;* or it may mean, as it generally does, bonds of the company—things capable of being taken into manual possession. We speak of purchasing State stock. This means bonds of the State—registered or coupon, which are as capable of manual caption as watches or other articles of personal property. These bonds, or individual bonds, or promissory notes, or bank notes, may be called credits. They are inventoried after the owner's death as credits, in the hands of his administrator. They are bought and sold, and the ownership transferred, sometimes by assignment, at other times by delivery, as goods and chattels. The words, stocks and credits, in the sense intended in the act, like the other words, mean physical things: such as may be seized, and held in custody within the territorial jurisdiction of the Court. In this sense the words are used by Congress; and in no other sense are these subjects capable of being subjected to proceedings *in rem*.

Res signifies that which has real, actual existence—a material thing, as distinguished from that which is spiritual or ideal—a thing capable of being held in custody. "A *right* of action" has no location. It cannot be said to be found in any territorial jurisdiction. It cannot be held in custody. It cannot be seized. A chose in action, as the 11th section of the Judiciary Act, uses it (1 Stat., 78,) when it says "any promissory note or other chose in action," may well be called a credit—a thing capable of being seized and held in custody. A chose in action, as a bond, may be the subject of proceedings *in rem;* but rights are determined in suits *in personam*.

Whether the above views are correct, need not be determined in deciding the present case. The information, warrant and re-

turn in Brown's case, are strictly *in rem*. The monition in his case, as in Pelham's, is that all persons interested in the *res*, be cited in general and special to answer the premises, and due proceedings being had, that the same be condemned, and the proceeds thereof be distributed according to law. See forms, Conkling's Treatise, (4th Ed.,) pp. 834, 835, and Benedict's Admiralty, (2d Ed.,) 499, 500, 501. The form of warrant, with attachment, and summons to garnishee, and the marshal's return in proceedings *in personam*, will be found in Benedict, pp. 638, 639. The difference between them and the warrant and return in the case now before the Court, is very marked.

Thus construed, the subjects and the mode of confiscation prescribed in the Act, are consistent; otherwise, they are inconsistent, and the Act as to some subjects, not capable of being enforced.

It is not to be denied, that Congress might have authorized confiscation by foreign attachment and garnishment; but it did not.

In the Act of the 20th April, 1818, (3 Stat., 443,) Congress authorized process of garnishment against debtors of corporations indebted to the Government; but it distinctly recognizes the proceedings as a suit *in personam*, and provides, (Sec. 8) "that no judgment shall be rendered against any garnishee until after judgment shall have been rendered against the corporation defendant in such action."

Again: Garnishment cannot be maintained, unless there is a subsisting right of action against the garnishee. The bond not having matured until after the breaking out of the war, right of action had not accrued to Brown; and during the war no creditor of Brown could have maintained garnishment against Kennedy. If the confiscation proceedings had been by foreign attachment and garnishment,—being *in personam* and *inter partes*, Brown being no party thereto, would not have been estopped thereby. *Dean* vs. *Nelson*, 10 Wall, 158.

2. The pardon to Brown, and the order to the officers to bring the money into Court, with the view of deducting the legal fees, and paying the balance to him, do not bar him from maintaining

his suit to foreclose the mortgage and enforce the payment of the bond.

That Brown was not guilty of the offenses charged, is shown in his application to the Executive for relief from confiscation proceedings, (pp. 26, 27) from the testimony, (pp. 7, 8, 9) and from this fact being agreed between the parties—p. 25. The special pardon surrendered to him all the rights of the Government, if any, to the moneys collected, save the legal costs; and the general amnesty of the 25th December, 1868, surrendered all that might have remained to the Government, of any acquisition from the confiscation proceedings. The Court looked after the moneys which had been squandered, with the view of making restitution to Brown. The moneys have never been returned to the Court, and Brown has received nothing.

In *Ex parte Morris and Johnson*, 9 Wall., 605, proceedings were taken against the officers, to compel them to return to the Registry of the Court, moneys which they had improperly withdrawn; and the Court said (p. 607), "this will in no wise interfere with any other remedy to which the petitioners may be entitled, except that they cannot be paid twice."

The right of the obligee in the bond and of the mortgagee, to pursue at the same time his several remedies, is well illustrated by Mr. Justice Miller in *Buck* vs. *Colbath*, 3 Wall., pp. 345, 346.

Brown can not be paid but once, and he expressly disclaims seeking anything more—p. 25. There is nothing in the present, more than in the earlier stages of the proceedings, which estops him from maintaining his suit on the bond and mortgage.

3d. The right to maintain this suit is not barred by limitations.

The Plaintiff's residence, the whole of his life, has been in that portion of Virginia, which unfortunately was embraced in the insurrection (pp. 7, 8, 9), and between him and the Defendants, intercourse was prohibited. That the time during the war is to be deducted in computing the period, at which the statute of limitations becomes a bar, is now well settled by a uniform current of decisions in the Supreme Court. *Hanger* vs. *Abbott*, 6 Wall., 532; *United States* vs. *Anderson*, 9

Wall., 56; *Levy* vs. *Stewart*, 11 Wall., 244; *Stewart* vs. *Kahn*, 11 Wall., 493; *Protector*, 9 Wall., 687; and 12 Wall., 700.

The Kansas Statute of the 20th of February, 1864 (General Statutes of Kansas, 1868, p. 550), required all suits for the recovery of "choses in action secured by mortgages or unsecured, seized and confiscated by process of law," under Act of Congress of the 17th of July, 1862, to be brought within one year from that date. The limit expired during the pendency of the war; and while the law was likely intended to apply specially to Brown's case, it falls within the range of the decisions above, especially of *Stewart* vs. *Kahn*, and presents no obstruction to the bringing of this suit.

The other limitations (General Statutes of Kansas, 1868, p. 633) are 15 years for the recovery of real property; and (sec. 18) civil actions, other than for the recovery of real property, within the following periods: First, "within 5 years: an action upon any agreement, contract or promise in writing."

This statute was approved the 25th of February, 1868; but took effect the 31st of October, 1868. It superseded a former statute, which fixed 3 instead of 5 years—Compiled Laws of Kansas, 1862, p. 127.

The period when the suspension, by the war, of the running of limitations, terminated, as to the citizens of Virginia, was in the *Protector*, (12 Wall., 700) held to be the 2d April, 1866. From the 2d April, 1866, to the 31st of October, 1868, is 2 years, 5 months, and 29 days. The bond in this case was not payable before the 28th May, 1861, after the commencement of the war, and the suspension of the running of limitations. Then, limitations commenced running the 2d April, 1866; and when the 3 years were replaced by 5, only 2 years, 5 months, and 29 days had elapsed. From the 31st October, 1868, to the 4th November, 1870, when this suit was instituted in the Court below, the time is 2 years and 4 days; making the whole time from 2d April, 1866, to 4th November, 1870, 4 years, 6 months, and 3 days. So that, if the Plaintiff be restricted to the right of action

on the bond, without regard to the limitations in a suit to foreclose a mortgage, the time necessary to constitute a bar had not elapsed when his suit was brought.

4. The Plaintiff on the pleadings, issues and proofs, should have had a decree for payment, and foreclosure in default thereof.

The Plaintiff in the Court below made out his case. He was guilty of no offense. While he was quietly obeying the laws of the country, with no knowledge of the proceedings of the officers of the District Court of Kansas, they on false charges, false returns and void decrees, received money from the Defendant Kennedy, and appropriated it to their own use. This does not relieve Kennedy from the obligations of his bond and mortgage, nor deprive Brown of his rights therein. The Appellant is entitled in law and equity to a decree for the money due according to the terms of the bond, and in default of payment, to foreclose the mortgage.

EDWARD S. BROWN,
Counsel for the Appellant.

Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

EDWARD S. BROWN
vs.
LAWRENCE KENNEDY *et al.*, } No. 444.

ARGUMENT FOR APPELLEES.

SUPREME COURT OF THE UNITED STATES.

Appeal from the Circuit Court of the United States for the District of Kansas.

EDWARD S. BROWN
vs.
LAWRENCE KENNEDY *et al.* } No 444.

ARGUMENT FOR APPELLEES.

Plaintiff, on the 4th day of November, 1870, filed his bill in Equity in the Circuit Court to foreclose a mortgage made by Lawrence Kennedy and wife to him May 28, 1860, to secure bond for $1,200, payable in one year from that date.

The defendants by answer set forth :

1st. That the money had been collected at suit of the United States in certain confiscation proceedings, describing them.

2d. Three years' limitation law of Kansas.

3d. Five years' limitation law of Kansas.

4th. The six months' limitation law applicable to suits to recover property confiscated.

5th. That the plaintiff had made himself a party to the confiscation proceedings, and taken such steps and invoked such action of the court therein as estopped him from attempting to avoid the collection of this money from Kennedy by the Marshal in the confiscation proceedings.

The matters so relied on in the defence, are set forth in the agreed statement submitting the case in the Circuit Court, as shown on pages 21 to 27, inclusive, of the printed record, as concisely as they seem to be capable of.

The depositions read on the hearing of the case do not in any way affect the legal results which must follow this statement of the case, as agreed.

The confiscation proceedings were against the bond, mortgage, and credit represented by them, and it would seem that, aside from the question of the effect of the return of the officer as to the seizure of the bond, and mortgage, and credit, the proceedings were the legal and appropriate ones to seize and hold the money due from Kennedy to plaintiff. The bond was past due and not negotiable, and could have been collected from Kennedy by garnishment in attachment proceedings. *2d Smith's Leading Cases*, p. 690.

The law provided for seizing credits; and what other course could have been adopted for that purpose, in the case *vs.* Brown and this credit, it would be difficult to point out.

We may also refer to 2d Smith's Leading Cases—680, 684, 687, 818, 827, 834, 835, 837, 693, and 694—in support of the validity of this judgment against the money in the hands of Kennedy.

Supposing the cases of Pelham *vs.* Rose, 9 Wal. 103, Miller *vs.* United States, 11 Wal. 268, and Pelham *vs* Way *et al.*, decided at present term of court, are conclusive of the case before the court, we will attempt to add nothing to the reasons and arguments already fully considered by the court in those cases; but if they were not conclusive, we insist that the plaintiff, by coming voluntarily into court and making himself a party to the confiscation proceedings, and asking and obtaining the judgment of that court for the money collected in those proceedings, in strict accordance with the terms of his pardon, then exhibited in that court, and by pursuing for a series of years the money so collected from Kennedy and others, estops himself from returning to the original mortgage and collecting this money from Kennedy. *2d Smith's Leading Cases*, 208 and 212; 17 *S. & R.*, 364.

If all this were ineffectual as a defence; if the return of the officer as to the seizure of the bond and mortgage and credit could be contradicted; if the monition served on the debtor and his appearance in court, and per-

forming the judgment of the court, by paying the debt then due to the plaintiff into court, in satisfaction of the judgment rendered against him; if the plaintiff's appearance to that proceeding against him and his property and obtaining a judgment, or rather a modification of the judgment, decreeing this money so collected from Kennedy and others to be paid to him, are all no defence to Kennedy, who has once paid this debt in good faith, as he believed, it is then insisted that the debt, and with it the foreclosure suit, is barred by the statutes of limitations of Kansas.

The act of the Legislature of Kansas, which took effect June 1st, 1859, (Compiled Laws 1862, p. 355, sec. 12,) changed the common law rights of mortgagor and mortgagee. This mortgage having been made subsequent to the passage of that law, is of course governed by it, and when the debt is barred, all remedy on the mortgage is gone. *Chick* vs. *Willets*, 2d Kansas, 385.

The law in force in Kansas from 1859 to November 1st, 1868, limited the time within which suit could be brought on this bond to three years, (Compiled Laws 1862, p. 127.) The right of action accrued on the 29th day of May, 1861, and on the 18th day of October, A. D., 1865, Edward S. Brown came to Kansas, with the pardon of the President in his pocket, and commenced the proceedings by which he is still endeavoring to collect this money from the officers who had collected it by virtue of the confiscation proceedings. (See page 23 of record.) During all that time he has been litigating in the courts in Kansas, amounting to over three years, before the repeal of the three years' limitation for suit on promissory note or bond. Unless the law forbidding the blowing of hot and cold with the same breath has been abrogated, it cannot require much calculation as to the exact time at which the war closed in Powhatan County, Virginia, to determine the question whether the limitations bar the plaintiff's suit for this debt. The plaintiff became by his application a party to the confiscation proceed-

ings on the 18th October, 1865, and said proceedings are still pending; and on the 4th of November, 1870, he began this suit.

On the 1st day of November, 1868, the law of the State of Kansas was so changed as to make the limitation five instead of three years, (Statutes 1868, p. 633, sec. 18,) with the provision that time already expired should be computed as part of the time, (p. 1128, sec. 7.) This suit was commenced November 4th, 1870; so that, if the plaintiff could have commenced his suit before November 4th, 1865, it is barred. Yet the facts agreed show him in Kansas, with full pardon, suing and litigating from October 18th, 1865, to the time of the commencement of this action. It is also claimed that the six months' limitation (Compiled Laws 1868, p. 550) is a bar to this suit. If the plaintiff is not estopped to claim that he could not have brought this suit before November 4th, 1865, by his own position and conduct, still we do not understand the war to have continued to that time, so as to even constructively save his right.

On the adjudicated cases in this court, by the Statutes of Limitations of Kansas, and by the doctrine of estoppel, the judgment should be affirmed.

EDWARD STILLINGS,
THOS P. FENLON,
For Appellees.

12. Statutes. p. 591.